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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL OGILVIE,

Petitioner,

v.

THOMAS JOHNSON

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

James W. Porter, II
Counsel of Record
Porter, Porter, & Hassinger, P.C.
P O Box 128
Birmingham, AL 35201-0128
(205) 322-1744

Counsel for Petitioner

QUESTIONS PRESENTED

1. Did the Eleventh Circuit err in affirming the district court's determination that Samuel Ogilvie is a state actor and, therefore, subject to liability under 42 U.S.C. § 1983.

2. Did the Eleventh Circuit err in affirming the district court's determination that Samuel Ogilvie is not entitled to qualified immunity.

3. Did the Eleventh Circuit err in affirming the district court's denial of immunities that are afforded to Samuel Ogilvie pursuant to the laws of the State of Alabama.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel Ogilvie respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a-3a) is reported at 200 Fed. Appx. 948. The order denying the petition for rehearing and for rehearing en banc (App. 4a-5a) is unreported. The memorandum opinion of the district court (App. 6a-78a) is reported at 423 F. Supp. 2d 1242.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was issued on October 18, 2006, and the petition for rehearing and for rehearing en banc was denied on January 17, 2007. This Court has jurisdiction over this petition under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

To be subject to liability under 42 U.S.C. § 1983, a person must be acting under the color of state law. See 42 U.S.C. § 1983. Further, this state actor must deprive a citizen of his or her Constitutional rights to be liable under 42 U.S.C. § 1983. See 42 U.S.C. § 1983.

STATEMENT

This case is about a civilian who, while participating in a police ride-along, came to the assistance of a police officer who was in the act of making an arrest.

Thomas Johnson's ("Johnson") claims arise out of his arrest by Officer Dewayne Wright ("Officer Wright"), who is a police officer for the City of Clanton, Alabama. Samuel Ogilvie ("Ogilvie"), was a volunteer participant in the City of Clanton's ride-along program when Officer Wright arrested Johnson. Even though, he, along with the other witnesses to the incident in question, knew Ogilvie was not a police

officer, but merely an untrained civilian, Johnson seeks to hold Ogilvie liable under 42 U.S.C. § 1983 as a state actor in the underlying cause of action.

Ogilvie is not, nor has he ever been employed or trained as a police officer. App. 6a-78a. App. 100a-107a.

The underlying facts of this case involve two (2) separate incidents. App. 6a-78a. The only parties involved in the first incident are Johnson, Officer Wright and Ogilvie. Id. The first incident occurred at the Skylight Bar in Clanton, Alabama on the evening of May 25, 2002. Id. This first incident only lasted a few minutes. Id. The second incident occurred at the Chilton County Jail later that evening and it involved Johnson and Chiton County Deputies Driver, Brock, Bland and Baker. Id. Johnson admits that Ogilvie was not involved in the second incident. Id. Therefore, the allegations against Ogilvie are only based on the facts arising out of the first incident. Id.

On the night of May 25, 2002, Johnson had been

drinking and decided to go with his wife to the Skylight Bar in Clanton, Alabama. Id. This is where the first incident occurs. Id. At approximately 11:15 p.m., Officer Wright saw the Johnson and his wife leave the Skylight Bar. App. 6a-96a. Since he had been drinking, Johnson's wife was going to drive them home. Id. While on a routine patrol, Officer Wright saw Johnson walk around from behind his vehicle in the parking lot where a puddle had formed on the ground. Id. Officer Wright expressed his belief that Johnson had urinated in the parking lot, and, thereby, informed Johnson that he was under arrest. Id. Johnson took off his hat and glasses causing Officer Wright to suspect that he was getting violent. App. 100a-107a. Johnson resisted arrest and a physical altercation between he and Officer Wright ensued. App. 6a-78a. App. 100a-107a. During this struggle, Officer Wright used chemical spray on Johnson and hit him with his baton. Id. Johnson fell to the ground. Id.

Ogilvie is not alleged to have spoken to, arrested, or

handcuffed Johnson. App. 79a-96a. In fact, Ogilvie is not alleged to have engaged in any active conduct until after Johnson resisted arrest and the physical altercation between he and Officer Wright was well underway. Id. Seeing Officer Wright struggle with a belligerent Johnson, Ogilvie, who was a volunteer civilian ride-along, got out of the police car to assist the officer. App. 6a-78a. App. 100a-107-a. He assisted Officer Wright by getting Johnson's right arm out from behind his back. Id. Thereafter, Officer Wright handcuffed Johnson. Id.

At 11:20 p.m., once Officer Wright handcuffed Johnson and he was securely in the police car, Officer Wright called the Chilton County Jail advising them that he was en route with Johnson. App. 6a-78a. Johnson admits that neither Officer Wright nor Ogilvie assaulted him during the ride to the Chilton County Jail. Id.

Once they arrived at the Chilton County Jail, the first incident concluded, along with the conclusion of Ogilvie's

involvement with Johnson, and the second incident began. Id. It is notable that when Johnson arrived at the Chilton County Jail, he did not require any medical treatment, nor was he treated for any type of physical injury caused by Ogilvie. Id.

It was not until after his physical altercation with the law enforcement present at the Chilton County Jail during the second incident that Johnson needed medical treatment and was sent to the hospital. Id. Ogilvie is not alleged to have been involved the second incident. Id. At 8:55 a.m. the morning following the second incident, Johnson's blood alcohol level was as high as 0.04%. Id. The hospital released Johnson after a few hours and the Chilton County Sheriff's Deputies booked him back into jail. Id.

At the time of the two incidents involved in this case, Ogilvie was merely a volunteer participant in the City of

Clanton's civilian ride-along program. App. 97a-99a. At no point in time did Ogilvie receive money, pay, benefits or anything of value from the City of Clanton. Id. Like other participants in the ride-along program, Ogilvie was issued a uniform donning a cloth badge that read "Explorer." Id. In no way did this badge resemble a badge issued to City of Clanton police officers. App. 97a-99a. App. 108a.

Testimony from eyewitnesses to the first incident, which is the only incident relevant to Ogilvie, show that no one was under the impression that Ogilive was a police officer. For example, Johnson's wife, Mildred, testified that she knew that Ogilvie could not perform the functions of a police officer and that he was merely a "young Explorer" which is "a volunteer type position to ride with the police officers... ." App. 109a. Additionally, Jennifer Glenn, another eyewitness to the first incident, testified that she knew Ogilvie was not a police officer because she heard

Johnson's wife, Mildred, say it that night at the Skylight Bar and because "of course, he wasn't in uniform." App. 108a.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's decision that Ogilvie is a state actor and, therefore, subject to liability under 42 U.S.C. § 1983 conflicts with its precedent.

A. The Eleventh Circuit's reliance on Williams v. United States, 341 U.S. 97, 71 S.Ct. 576 (1951) is misplaced.

The Eleventh Circuit erred in relying on this Court's decision in Williams V. United States, 341 U.S. 97, 71 S.CT. 576 (1951) in its decision to uphold the district court's determination that Ogilvie acted as a state actor, on the night in question, for the purposes of Section 1983 liability. Johnson v. Ogilvie, 200 Fed. Appx. 948 (11th Cir. 2006). In Williams this Court dealt with the issue of whether a "special police officer could be criminally prosecuted under 18 U.S.C. § 242." Payton v. Rush-Presbyterian-St. Luke's Medical

Center, et al., 184 F.3d 623, 626 (7th Cir. 1999). Although 18 U.S.C. § 242 is a similar statute, it is clearly not identical to 42 U.S.C. § 1983. Id.

The central holding in Williams was that "a private security guard [who was] *granted special powers under a Florida statute* could be prosecuted under federal civil rights law for beating a confession out of criminal suspects." Id. (internal citations omitted) (emphasis added). Not only was the private actor in Williams ***granted special powers by the State of Florida*** but he also "flashed a ***city-issued badge*** while he beat his victim." Id.

> In holding that Williams' actions were undertaken under color of law, *the Court stressed that he held a special police officer's card issued by the City of Miami, Florida, and had taken an oath and qualified as a special police officer.*

Collins v. Womancare, et al., 878 F.2d 1145, 1149 (9th Cir. 1989) (internal quotations and citations omitted) (emphasis added). The factual circumstances in Williams are vastly and

undisputably different that the circumstances underlying the case at bar.

Ogilvie is not, nor has he ever been employed or trained as a police officer. App.6a-78a. App. 100a-107a. At the time of two incidents involved, Ogilvie was merely a volunteer participant in the City of Clanton's civilian ride-along program. App 6a-78a. App. 97a-99a. Like other participants in the ride-along program, Ogilvie was issued a uniform donning a cloth badge that read "Explorer." Id. In no way did this badge resemble a badge issued to City of Clanton police officers. App. 97a-99a. App. 108a. In fact, Jennifer Glenn, an eyewitness to the first incident, testified that she knew Ogilvie was not a police officer because "of course, he wasn't in uniform." App. 108a. Furthermore, at no point in time did Ogilvie receive money, pay, benefits or anything of value from the City of Clanton. App. 97a-99a. So contrary to the private actor in Williams, Ogilvie was not

a *paid security guard* who was granted any "*special powers.*" Collins v. Womancare, et al., 878 F.2d 1145; 1149 (9th Cir. 1989) (internal quotations and citations omitted) (emphasis added).

In Williams, the defendant had been ***"vested with policeman's powers pursuant to the City of Miami's policy."*** Collins v. Womancare, et al., 878 F.2d 1145, 1149 (9th Cir. 1989) (internal quotations and citations omitted) (emphasis added). To the contrary, Ogilvie was never vested with any policeman powers by the City of Clanton. In fact, Johnson's wife, Mildred, who works as a dispatcher for the City of Clanton Police Department and was also an eyewitness to the first incident, testified that she knew that Ogilvie was only a volunteer ride-along and that he did not have the power to perform the functions of a police officer. App. 109a. Therefore, the decision in Williams "sheds little light on th[e] case or the status of a citizen's arrest." Id.

As previously stated, everyone involved knew that Ogilvie was not a police officer and was merely a volunteer. There was no misconception or misrepresentation here, nor did the City delegate any special powers to Ogilvie. At most, this is a case of a citizen's arrest. In Collins v. Womancare, et al., 878 F.2d 1145 (9th Cir. 1989), the Ninth Circuit recognized that they could not find one federal decision involving 42 U.S.C. §1983 where a citizen's arrest constituted a state action, and Johnson has failed to provide a single federal decision showing otherwise. Collins v. Womancare, et al., 878 F.2d 1145, 1150 (9th Cir. 1989) (internal quotations and citations omitted).

Based on the foregoing, it is clear that the Eleventh Circuit's reliance on Williams v. United States, 341 U.S. 97, 71 S.CT. 576 (1951) was misplaced.

B. The Eleventh Circuit's decision that Ogilvie is a state actor conflicts with its previous decisions in Lowe V. Aldridge, et Al, 958

F.2d 1565 (11th Cir. 1992) and Harvey V. Harvey, 949 F.2d 1127 (11th Cir. 1992).

As a volunteer, participating in a ride-along program, Ogilvie is not subject to civil liability under 42 U.S.C. § 1983. To be subject to Section 1983 liability a person must be a "state actor."

> The traditional definition of acting under color of state law requires that the defendant in a § 1983 action exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

West v. Atkins, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (quoting United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 l.Ed. 1368 (1941)). However, Johnson failed to show that Ogilvie is a state actor.

> In order to state a claim under [Section] 1983, a plaintiff must demonstrate that the party charged with the [constitutional] deprivation must be a person who may fairly be said to be a state actor.

See Lowe v. Aldridge, et al., 958 F.2d 1565, 1572 (11th Cir. 1992). Furthermore, "only in rare circumstances can a private party be viewed as a state actor for [Section]1983 purposes." See Lowe v. Aldridge, et al, 958 F.2d 1565, 1572 (11th Cir. 1992) (citing Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992)). Ogilvie is not, nor has he ever been employed or trained as a police officer. App.6a-78a. App. 100a-107a. He is a private party and, therefore, if it is determined that he took part in any arrest at all, it could only be viewed as a citizen's arrest.

The Eleventh Circuit recognizes the following three tests used in determining whether a private party can be considered a state actor: (1) the Public Function Test, (2) the State Compulsion Test and (3) the Nexus/Joint Action Test. See Lowe v. Aldridge, et al, 958 F.2d 1565, 1572 (11th Cir. 1992) (citing NBC v. Communications Workers of America, AFL-CIO, 860 F.2d 1022, 1026 (11th Cir. 1988)). As shown

below, Ogilvie cannot be considered a state actor under the application of any of the aforementioned tests.

- The **Public Function Test** "covers only private actors performing functions 'traditionally the exclusive prerogative of the State'". See Lowe v. Aldridge, et al, 958 F.2d 1565, 1572 (11th Cir. 1992) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353, 95 S.Ct 449, 454-55, 42 L.Ed.2d 477 (1974)). The parameters of the Public Function Test were further defined by the Eleventh Circuit in Harvey v. Harvey, 949 F.2d 1127 (11th Cir. 1992). In Harvey, the Eleventh Circuit stated that:

> Whether the private party has powers co-extensive with the state is irrelevant; the public function test shows state action only when private actors are given powers (or perform functions) that are 'traditionally the exclusive prerogative of the state.'

Harvey v. Harvey, 949 F.2d 1127, 1131 (11th Cir. 1992) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353, 95 S.Ct 449, 454-55, 42 L.Ed.2d 477 (1974)). "Few

activities are 'exclusively reserved to the states.'" Harvey v. Harvey, 949 F.2d 1127, 1131 (11th Cir. 1992) (quoting Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 156-57, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978)). So few in fact that "even arrest, detention, and search **are not** exclusively reserved to states." Harvey v. Harvey, 949 F.2d 1127, 1131 (11th Cir. 1992) (quoting White v. Scrivner Corp., 594 F.2d 140, 142 (5th Cir. 1979)). Therefore, even if Ogilvie had arrested Johnson, *which it is undisputed that he did not*, he still would not be considered a state actor. Furthermore, there are no other functions that could have been performed by Ogilvie at the time of the incident in question that would qualify as a public function.

The **State Compulsion Test** involves situations where "the government has coerced or at least significantly encouraged the action to violate the Constitution." Lowe v. Aldridge, et al, 958 F.2d 1565, 1572 (11th Cir. 1992) (citing

NBC v. Communications Workers of America, AFL-CIO, 860 F.2d 1022, 1026 (11th Cir. 1988). Johnson has not made any allegations that the City of Clanton, any City Official nor that Officer Wright coerced or significantly encouraged Ogilvie in any of his actions. Therefore, Ogilvie is not a state actor under this test.

The **Nexus/Joint Action Test** determines whether the government entity has "so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise." Lowe v. Aldridge, et al, 958 F.2d 1565, 1572 (11th Cir. 1992) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353, 95 S.Ct 449, 454-55, 42 L.Ed.2d 477 (1974). The most common example of a "joint action" would be a conspiracy. In order to prove this, Johnson must show that Ogilvie acted in concert or reached an understanding with City officials to deny or deprive Johnson of his rights. See Lowe v. Aldridge, et al,

958 F.2d 1565, 1572 (11th Cir. 1992). However, Johnson has not made any allegations of a conspiracy nor has he offered any such evidence. Therefore, Ogilvie is not a state actor.

Based on the foregoing, it is clear that he Eleventh Circuit's decision is inconsistent with precedent and their reliance on this Court's decision in Williams V. United States, 341 U.S. 97, 71 S.CT. 576 (1951) was misplaced.

II. The Eleventh Circuit's decision that Ogilvie is not entitled to qualified immunity conflicts with its precedent.

Even if, in light of all of the evidence to the contrary, the Eleventh Circuit did not err in upholding the district court's determination that Ogilvie was a state actor, Ogilvie would most certainly be entitled to qualified immunity. Qualified immunity is an affirmative defense to a 42 U.S.C. § 1983 action against a state actor sued in his individual capacity. See Wilson v. Strong, 156 F.3d 1131, 1135 (11th Cir. 1998); see also Hill v. Dekalb Regional Youth Detention

Center, 40 F.3d 1176, 1184 n.16 (11th Cir. 1994). The test for whether a state actor is entitled to qualified immunity involves a three-step analysis.

The first inquiry is to identify the specific constitutional right allegedly infringed. Section 1983 "is not itself a source of substantive rights." Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (citation omitted). To "identify" the right at issue, means to "identify the exact contours of the underlying right said to have been violated." County of Sacremento v. Lewis, 523 U.S. 833, 842-843 n.5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (citing Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870-1871, 104 L.Ed.2d 443 (1989)). See also Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Johnson has completely failed to identify with particularity a specific "contour" of a constitutional right that was allegedly violated by Ogilvie. App. 79a-96a.

The second inquiry is to determine whether Johnson's claims, if proven, actually establish a ***violation*** of the identified and specific constitutional right. See Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508, 2513, 153 L.Ed.2d 666 (Jun. 27, 2002). First of all, Ogilvie did not even arrest Johnson. App. 6a-78a. He, as an untrained citizen, merely assisted Officer Wright when Officer Wright was struggling to handcuff Johnson. Id. In any event, there is not even a claim for false arrest pending. Furthermore, there was clearly enough probable cause for Officer Wright to arrest Johnson for public intoxication which bars his claim under Section 1983. In the Eleventh Circuit,

> To receive qualified immunity protection, "an officer need not have actual probable cause but only *'arguable probable cause.'*" Montoute v. Carr, 114 F.3d 181, 184 (11th Cir.1997). Because only arguable probable cause is needed, *"the inquiry is not whether probable cause actually existed, but instead whether an*

> *officer reasonably could have believed that probable cause existed, in light of the information the officer possessed."* Id. "Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (internal quotation marks omitted).

Wood v. Kesler, 323 F.3d 872, 878 (11th Cir. 2003) (emphasis added). See also Marx v. Gumbinner, 905 F.2d 1503, 1505-06 (11th Cir.1990). Therefore, even if Ogilvie acted under the color of state law, he would still be entitled to qualified immunity if there was ***arguable*** probable cause to arrest Johnson.

It should be repeated, that Ogilvie is not, nor has he ever been employed or trained as a police officer. App.6a-78a. App. 100a-107a. Therefore, he has not bee adequately trained to know what constitutes probable cause. Ogilvie was merely

helping Officer Wright when he saw Officer Wright struggling with Johnson. In any event, clearly there was arguable probable cause to arrest Johnson for public intoxication based on factual circumstances at the Skylight Bar on the night in question. So clear, in fact, that Johnson does not even maintain a claim for false arrest against Ogilvie.

If the second inquiry is resolved in Johnson's favor, then the third inquiry requires a determination as to whether the constitutional right, asserted by Johnson to have been violated by Ogilvie, was "clearly established" in a particularized sense, and in the law, at the time he acted. See Godby v. Montgomery Co. Bd. Of Educ., 996 F.Supp. 1390, 1400 (M.D. Ala. 1998) (citing Jordan v. Doe, 38 F.3d 1559 (11th Cir. 1994)). The relevant inquiry must demonstrate that Ogilvie had ***"fair warning"*** that his conduct was unconstitutional. Hope v. Pelzer, 122 S.Ct. at 2516:

> In Anderson, we explained that what "clearly established" means

> in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S., at 639, 107 S.Ct. 3034. "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id., at 640, 107 S.Ct. 3034 (citations omitted); see also United States v. Lanier, 520 U.S. 259, 270, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

Wilson v. Layne, 526 U.S. 603, 614-615, 119 S.Ct. 1692,1699 (U.S. 1999).

Johnson bears the burden of demonstrating that Ogilvie violated *clearly established* law. See McMillian v. Johnson, 88 F.3d 1554, 1562 (11th Cir. 1996), modified by 101

F.3d 1363 (11th Cir. 1996). As a mere citizen, with no police training, Ogilvie would not have any "fair warning" that a claim could be brought against him under 42 U.S.C. § 1983. There is not a case from the U.S. Supreme Court nor the Eleventh Circuit that would indicate that volunteer participants in a City of Clanton's civilian ride-along program could be held liable under 42 U.S.C. § 1983. Furthermore, there are no cases whatsoever with any bearing on this inquiry that can be contrasted to the facts alleged in the instant matter. The absence of such a case speaks to the proposition, which is supported both by law and common-sense, that such action by a volunteer would not be known to be unlawful. Certainly, there are no cases that would have given Ogilvie a "fair warning" that the alleged actions were unconstitutional. Johnson has failed to meet his burden.

Even if the Eleventh Circuit did not err in upholding the district court's determination that Ogilvie was a state

actor, he would still be entitled to qualified immunity because, having no police training, he would not have had any fair warning that his alleged actions violated a clearly established law.

III. The Eleventh Circuit's decision to deny Ogilvie immunity from the pending state law claims conflicts with the laws of the State of Alabama.

A. Ogilvie is entitled to immunity under Alabama's Volunteer Service Act.

Ogilvie is immune from Johnson's Alabama state law claims for Assault and Battery because the Alabama's Volunteer Service Act immunizes him, as a volunteer, from civil liability. Section 6-5-336 of the Code of Alabama (1975). Under the Volunteer Service Act, a volunteer is entitled to immunity if "[t]he volunteer was acting in good faith and within the scope of such volunteer's official functions and duties . . . ." ALA. CODE § 6-5-336 (1975).

The facts, as alleged, show that Ogilvie's conduct was

made in good faith. With regard to his state law claims, Johnson has *never* alleged that Ogilvie was willful or wanton in his conduct. App. 6a-78a. App. 79a-96a. Furthermore, the arrest was lawful. Therefore, Ogilvie is entitled to immunity, afforded to him under Alabama's Volunteer Service Act, from Johnson's remaining state law claims for Assault and Battery.

B. In any event, Ogilvie would be entitled to Discretionary Function Immunity.

As previously stated, Ogilvie is not, nor has he ever been employed or trained as a police officer. App.C6a-78a. App. 100a-107a. However, if Ogilvie is going to be treated as a state actor for the purposes of Section 1983 liability, then he should not only enjoy qualified immunity from Johnson's Section 1983 claims, but he should also enjoy the same discretionary function immunity afforded to peace officers in the State of Alabama from Johnson's state law claims for Assault and Battery. Section 6-5-338 of the Code of Alabama

deems every peace officer an officer of the State of Alabama and awards immunity to all peace officers from liability incurred in the performance of their discretionary law enforcement duties. See ALA. CODE § 6-5-338 (1975).

Based on the foregoing, the Eleventh Circuit erred in upholding the district court's denial of immunity to Ogilvie from Johnson's state law claims, no matter if the immunity is derived from his position as a volunteer or due to any discretionary act he may performed.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

Respectfully Submitted,

/s/ James W. Porter, II
James W. Porter, II
Attorney of Record for City of Alabaster
State Bar ID ASB 3314 T79J
State Code POR001

OF COUNSEL:
PORTER, PORTER & HASSINGER, P.C.
P.O. Box 128
Birmingham, Alabama 35201-0128
(205) 322-1744

Counsel for Petitioner

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

THOMAS JOHNSON, PLAINTIFF-APPELLEE,

V.

SAMUEL OLGILVIE, individually and as an explorer for the City of Clanton, DEFENDANT-APPELLANT.

DOCKET NO. 05-16360.

ARGUED: OCTOBER 3, 2006.
DECIDED: OCTOBER 18, 2006.

On Appeal from the United States District Court for the Middle District of Alabama

Before: ANDERSON, DUBINA, Circuit Judges, and VINSON, District Judge.

PER CURIAM:

After careful consideration, and for the reasons noted herein and discussed at oral argument, we conclude that the judgment of the district court with respect to appellant Ogilvie is due to be affirmed. With respect to appellant's challenge to his status as a state actor, and based on the facts

assumed by the district court, we conclude that Williams v. United States, 341 U.S. 97, 71 S.Ct. 576 (1951), clearly establishes that appellant here was a state actor. With respect to the excessive force claim, we accept the facts assumed by the district court, namely, that appellant actively participated in the arrest of plaintiff, and personally participated in the beating after the plaintiff was already down, not resisting, and handcuffed; during the beating, plaintiff's head was slammed into the paved parking lot. Under the assumed facts, the district court did not err in denying qualified immunity with respect to plaintiff's excessive force claim. Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002); Slicker v. Jackson, 215 F.3d 1225 (11th Cir. 2000); and Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998). Also, on the facts assumed by the district court and accepted by us, it is clear that there was no arguable probable cause for the arrest. Finally, we agree with the district court's denial of Ogilvie's claim for immunity from the Alabama law claims under Voluntary Service Act.

AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: /s/ Signature illegible
Deputy Clerk
Atlanta, Georgia

APPENDIX B

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

THOMAS JOHNSON, PLAINTIFF-APPELLEE,

V.

CITY OF CLANTON, a municipal corporation, ET AL., SAMUEL OGILVIE, individually and as an explorer for the City of Clanton, JOE MONROE, individually and in his capacity as police officer for the City of Jemison, DEFENDANTS-APPELLANTS.

DOCKET NO. 05-16360-EE

DECIDED: SEPTEMBER 5, 2006

On Appeal from the United States District Court for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: ANDERSON and DUBINA, Circuit Judges, and VINSON, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Signature illegible

UNITED STATES CIRCUIT JUDGE ORD-42

APPENDIX C

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF ALABAMA

THOMAS JOHNSON, PLAINTIFF,

V.

DEWAYNE WRIGHT, ET AL., DEFENDANTS.

NO. CV-04-117-F

OCTOBER 17, 2005

MEMORANDUM OPINION AND ORDER

In February of 2004, Plaintiff Thomas Johnson brought this suit against a variety of law enforcement officers, a law enforcement volunteer, and the entities for which they worked. Plaintiff was arrested outside a bar in Clanton, Alabama in May of 2002. He contends that he was arrested without probable cause and that the force used to effectuate his arrest was excessive. He also contends that he was beaten and subjected to illegal treatment after being transported to the Chilton County Jail that night. This Court

has previously ruled on certain motions dismissing some of the defendants from this action. This Memorandum Opinion and Order addresses the motions for summary judgment the remaining defendants have filed.

Specifically, this cause is before the Court on the following motions: (a) Officer Dewayne Wright's Motion for Summary Judgment (Doc. # 87) filed on April 19, 2005; (b) Samuel Ogilvie's Motion for Summary Judgment (Doc. # 84) filed on April 19, 2005; (c) the Motion for Summary Judgment filed on April 12, 2005 by Defendants Kevin Driver, Stephen Brock, Robert Bland, and Nick Baker (Doc. # 76), and (d) Defendants' Mark Bass and Robert Monroe's [sic] Motion for Summary Judgment (Doc. # 120) filed on June 6, 2005. Because these motions raise many of the same issues, the Court will address these motions together in this Memorandum Opinion and Order. For the sake of clarity and brevity, each defendant will be referred to in this Memorandum Opinion and Order by his surname. Thomas

Johnson will be referred to as Plaintiff or Johnson.

JURISDICTION AND VENUE

This Court has subject matter jurisdiction over the claims in the action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) & (4), and 1367. No challenge is made to the personal jurisdiction over the parties or the appropriateness of venue; both of which are supported by the facts of this case.

STANDARD OF REVIEW

Under Rule 56(adfcef) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mater of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for

its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that non-moving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-23.

Once the moving party has met its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *id.* at 324. To avoid summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586

(1986). On the other hand, a court ruling on a motion for summary judgment must believe the evidence of the non-movant and must draw all justifiable inferences from the evidence in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

Some of the Defendants in this case have urged this Court to grant summary judgment on certain grounds because Plaintiff failed to address those grounds in his brief in opposition to their summary judgment motions. For example, Brock, Bland, Baker and Driver contend that they are entitled to summary judgment on all claims brought by Plaintiff other than his Fourth Amendment claim for excessive force and state law claims for assault and battery

because he abandoned such claims by failing to address them in his opposition to their motions for summary judgment. *See* Doc. # 17. While it would make this Court's job considerably easier if it could grant summary judgment on every claim that a party fails to address in opposing a motion for summary, the law of this Circuit does not allow this Court to take such an approach. *See, e.g., Trustees of Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Employers v. Wolf Crane Serv., Inc.*, 374 F.3d 1035, 1039-40 (11th Cir. 2004). This Court cannot base the entry of summary judgment on the mere fact that the motion was unopposed but, rather, must consider the merits of the motion, nor can this Court deem a claim abandoned by a plaintiff absent some affirmative indication that he no longer wishes to pursue that claim. *Id.*

PROCEDURAL HISTORY

On February 11, 2004, Johnson filed suit against the

City of Clanton, Wright, Ogilvie[1], the Chilton County Commission, Brock, Bland, Baker, Driver, Bass, Monroe, and some fictitious defendants. On April 26, 2004, Johnson filed his Amended Complaint (Doc. # 30). The Amended Complaint names the same defendants as the Complaint except that it does not contain any allegations against any fictitious defendants.

The Amended Complaint sets forth several claims. Several of the claims allege violations of Plaintiff's rights under the United States Constitution. These claims are brought pursuant to 42 U.S.C. § 1983. The constitutional violations alleged are: a violation of the Fourth Amendment

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[1] Ogilvie is the proper spelling of this defendant's surname. The Complaint and the Amended Complaint identified this defendant as Olgilvie. Counsel for this defendant has used both spellings in submissions. It was not until reviewing the deposition testimony submitted in conjunction with the instant motions that the Court was able to ascertain the proper spelling of this name. The Court will refer to this Defendant as Ogilvie.

prohibition on the use of excessive force (Count One);[2] on unreasonable seizures (Count Two); and a Fourth Amendment violation of the prohibition on arrest without a warrant or probable cause (Count Three). In addition to these claims under federal law: assault (Count Four); battery (Count Five); negligence (Count Six); and false arrest/false imprisonment (Count Seven). Plaintiff seeks a declaration that the practices complained of are unlawful and in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution; compensatory damages of $1,000,000; punitive damages of $5,000,000; attorneys' fees and costs; and all other relief the Court deems just and proper.

By prior orders of this Court, all claims against Bass, the City of Clanton, and the Chilton County Commission

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[2] Although the heading on Count One refers only to the Fourth Amendment, the actual allegations of this count also allege violations of rights under the Fifth and Fourteenth Amendments. Am. Compl. at ¶ 35.

have been dismissed. Additionally, the sole claims against Wright and Ogilvie pursuant to 42 U.S.C. § 1983 arise from alleged violations of Plaintiff's Fourth Amendment rights to be free from the use of excessive force and from unlawful arrest. All defendants remaining in this action at this time are sued only in their individual capacities and are not sued in their official capacities.

FACTS

It is well-settled that in reviewing the merits of motions for summary judgment, this Court must view the facts in the light most favorable to the non-moving party. In this case, that party is the plaintiff. Additionally, this Court may not make credibility determinations or resolve factual disputes. Only in the absence of genuine issues of material facts may defendants, such as the movants in this case, establish that they are entitled to judgment as a matter of law. The Court has carefully reviewed the numerous depositions, affidavits, and other documents submitted in support of and

in opposition to the pending motions. In this Court's review, the record is replete with disputes over what occurred.

On the night of Saturday, May 25, 2002, Johnson and his wife went to the Skylight Bar because Johnson's wife wanted to go dancing.[3] After less than fifteen minutes in the bar, Johnson and his wife decided to leave because they didn't care for the band that evening. There is undisputed testimony before this Court that before leaving, Johnson used the bathroom in the bar. Johnson and his wife then spoke briefly with the manager who refunded the cover charge they had paid. Johnson did not consume any alcohol while in the Skylight Bar. Johnson and his wife walked hand in hand to their parked car. When they were getting into the vehicle a police car pulled up right behind their car.

The police car which pulled up behind the Johnson's car contained Wright, then a police officer for the City of

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[3] Because Johnson had consumed some beer that evening, his wife drove.

Clanton[4], and Ogilvie, a member of a volunteer ride-along program called the Explorer Program.[5] According to Wright,

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[4] According to the undisputed evidence before this Court, Wright's employment with the City of Clanton police department terminated after the events giving rise to this lawsuit due to incidents unrelated to the events giving rise to this lawsuit. Wright is currently employed as a police officer in Selma, Alabama.

[5] The City of Clanton operates a program called the Explorer Program. This is a volunteer program by which civilian volunteers can ride along with the police. The Explorer Program in the City of Clanton is affiliated with the Boy Scouts of America; however, not all participants in the Explorer Program were members of the Boy Scouts of America. Indeed, Ogilvie was not a member of the Boy Scouts of America. Rather Ogilvie was simply a person with interest in becoming a police officer. He received a letter concerning the Explorer Program and went to an informational meeting about the program. After this meeting his signed up for the program in 1997 or 1998. After signing up for the Explorer Program, Ogilvie participated in the program for a number of years. During his participation in the program, he wore a uniform provided to him by the City of Clanton Police Department. The pants to this uniform were the same as those worn by the police officers for the City of Clanton. The shirt for this uniform was of a similar style and color, but it had different cloth patches on the sleeve and had a cloth badge on the chest which had the word "Explorer" in place of the metal police badge worn by officers. The City of Clanton does not pay participants in the Explorer Program. During Ogilvie's participation in the

he was just driving through the parking lot on a routine patrol when he saw Johnson urinating in the parking lot.[6] Johnson and his wife testified that Johnson did not urinate in the parking lot[7] and attribute the puddle of liquid near Johnson's feet to fluids leaking from his vehicle.

The events which occurred after Wright saw Johnson next to his vehicle are very much in dispute.[8] It is undisputed

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program, he helped chaperone of DARE program dance and he helped direct traffic for parking at high school football games. He also rode along with City of Clanton police officers on patrol numerous times and sometimes assisted the officers with whom he was riding with arrests.

[6] It is clear from Wright's testimony that he could see only Johnson's back and that he believed he say liquid hitting the ground in front of Johnson. Wright testified that as Johnson turned around Wright saw Johnson's penis and he was zipping up his pants. Ogilvie only saw the puddle near where Johnson had been standing and Johnson zipping up his pants as he turned around.

[7] According to Johnson's testimony he had just used the bathroom in the bar before walking out to the car.

[8] Before this Court are several descriptions of the events in the parking lot. Johnson and his wife have given sworn testimony about what happened. Wright and Ogilvie have also provided sworn testimony about the events.

that Wright first addressed Johnson from the police cruiser through the cruiser's open window. Wright asked Johnson what he was doing and asked if he had urinated in the parking lot. Johnson replied that he was not doing anything.[9] After this initial exchange, Wright got out of his police car and approached Johnson. Ogilvie followed. According to some witnesses, Johnson was neither loud or disrespectful to Wright. According to Wright, Johnson was both loud and disrespectful and approached Wright with clenched fists. According to Ogilvie, Johnson seemed to be a mean and aggressive type who was standing in an aggressive posture. Glenn testified that Wright was yelling and screaming at

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Finally, the Court has before it the sworn testimony of Jennifer Glenn, the daughter of the Chief of Police for the City of Clanton. Glenn was in the parking lot of the Skylight Bar at the time of the events giving rise to Johnson's claim against Wright and Ogilvie.

[9]Wright's testimony, which is disputed by the testimony of other witnesses, indicates that Johnson's initial response to him was angry, loud, and profane.

Johnson, but that she did not hear Johnson "get loud" in response. Johnson and his wife testified that Wright was screaming at Johnson and spitting in his face. They contend that Wright yelled at Johnson like a drill instructor and demanded that he say "Sorry officer sir, I'm sorry." During this exchange, Wright continued to accuse Johnson of urinating in the parking lot and Johnson insisted that he had not done so and pointed out that there were numerous puddles in various places around the parking lot. [10] Wright accused Johnson of "bowing up" at him and took out his can of mace. According to Johnson and his wife, when Wright accused him of "bowing up" he addressed Johnson, an African American adult make of nearly forty years of age as "boy." [11] During this exchange, Wright and Johnson were relatively close to one another on the passenger side of

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[10] Ogilvie testified that there were wet spots all around the parking lot.

[11] Wright is Caucasian.

Johnson's car. Ogilvie was a few feet behind Wright.

Johnson's wife, who works as a 911 operator for Chilton County, [12] came around to the passenger side of the vehicle where Johnson and Wright and Ogilvie were standing. Johnson's wife knew Wright from her work as a 911 operator. She addressed Wright by his first name and asked him what was going on. Johnson's wife held her husband's hand and told him to be quiet and still while Wright was "getting in his face" and "calling him a boy" and otherwise acting in a manner that could be seen as trying to provoke Johnson. Wright told Johnson's wife that this was none of her business and threatened to arrest her too.

Wright claims that once he saw Johnson's wife and recognized her as working for law enforcement he decided to get away from the situation and let her handle it. He also contends that Johnson was using profanity and called him

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[12] Chilton County is the county in which the City of clanton is located.

"several racist remarks."[13] About this time, Wright got a call over the radio to head to a fight in progress in another part of town. Wright testified that he intended to leave to respond to the call, but before leaving he told Johnson that it was illegal to urinate in a parking lot and demanded that Johnson indicate that he understand that. Wright repeated his demand. Johnson's wife was repeatedly saying she was sorry and that they had not done anything. Johnson said to Wright "You're going to arrest [Johnson's wife]? She didn't do nothing." Wright reacted with what appeared to several witnesses as rage. Glenn heard Wright shaking the can of mace and saw Wright run toward Johnson [14] demanding "What did you say to me, boy?" According to some

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[13] When asked for the specifics regarding the racist remarks, Wright indicated that Johnson called him "a racist white" and used profanity.

[14] Although the testimony is quite confused, it appears that Wright had begun to walk back to the police car at some point.

witnesses, Wright told Johnson that he was under arrest.[15] Johnson, who apparently had started to get into his car when Wright had begun to walk back toward the police car, turned around. Wright sprayed Johnson in the face with mace at least twice and started beating Johnson with a baton.[16] Johnson grabbed his eyes. One of the baton blows knocked Johnson off his feet. After Johnson was on the ground, Wright jumped on Johnson and to put handcuffs on him. Ogilvie jumped down on Johnson's back to help cuff him because of Johnson's size. Johnson was not fighting back or struggling with Wright and Ogilvie while they were trying to

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[15] Ogilvie and Wright both testified that Johnson was arrested for public intoxication.

[16] Wright contends that he sprayed mace on Johnson because Johnson stepped toward Wright like he was going to hit or push Wright after having been told he was under arrest. Wright further contends that he only struck Johnson once with his baton in order to get him on the ground for cuffing after Johnson failed to respond to Wright's command that he get on the ground and appeared to Wright to be swinging at him despite having been sprayed with mace. This testimony is in conflict with the account of other witnesses.

cuff him, but Wright stated that when Johnson fell to the ground he landed on top of his arm and was not complying with Wright's commands to give him his other arm. Of course, Wright also testified that often when suspects have been sprayed with mace, they don't hear what is said to them. According to Johnson and his wife, Wright beat him with the baton both before and after he was handcuffed. Johnson and his wife also testified that Ogilvie beat him with a baton after Johnson was in handcuffs.[17] Unbeknownst to Wright, Ogilvie had purchase an expandable baton, known as an asp, and had it on his person that night. [18] Ogilvie also carried a radio

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[17] Ogilvie admits that he and Wright had expandable batons out and ready to use and that Wright hit Johnson at least one time. Ogilvie denies hitting Johnson with his baton.

[18] The city of clanton does not allow its police officers to carry police batons unless they are certified and have adequate training. Nevertheless, the City of Clanton Police Department's written rules for ride alongs does not contain any prohibition against carrying a baton, nor does it address any training requirements for volunteers carrying batons. Indeed, Ogilvie testified that he was never told not to carry his retractable steel baton and that to his knowledge it was

some handcuffs which he had purchased for use when he rode along with the police.

Johnson began to bleed. Johnson's wife was crying and begging them to stop. Glenn ran over and screamed at the officers. Wright ordered Glenn not to approach.

Wright and Ogilvie picked Johnson up off the ground. There was a puddle of blood on the pavement where he had been laying. At some point after Johnson had been taken to the ground, his head had been knocked against the concrete his wife saw blood spewing out of his head wound. Wright and Ogilvie put Johnson in the back of the police car. Johnson's wife was crying and Glenn was trying to comfort her. Johnson's wife approached the police car. According to Johnson, Ogilvie told Johnson's wife to get out of there or he would arrest her. Johnson's wife responded by indicating that Ogilvie could not arrest her because he was not a police

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not a violation of any policy to carry it.

officer. [19]

Wright and Ogilvie drove Johnson to the Chilton County jail. Wright and Ogilvie took Johnson to the booking area. According to Johnson, the handcuffs which had been placed on him at the Skylight Bar were not removed when he arrived at the booking area. According to Johnson, Wright and the lady behind the desk were laughing and someone said "What have we got here?" The lady behind the desk asked what the charges against Johnson were and Wright and Ogilvie looked at each other and responded that they didn't know. This statement prompted Johnson to ask why he was there. [20]

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[19] Ogilvie's account of this is in conflict to some extent with Johnson's account. Ogilvie contends that he told Johnson's wife that the best thing she could do was get in her car and go home. According to Ogilvie, Johnson's wife then retorted that Ogilvie was not a police officer. Ogilvie responded that he was not but that Wright was and that she was being disorderly.

[20] According to the testimony of some of the defendants, Johnson was loud and profane when he was in

An officer named Brock [21] took Johnson into another room called the "dress out room" and asked him to remove his shoes. The stated purpose for taking Johnson into the dress out room was to get him into a jail uniform. According to Johnson, his hands were still cuffed behind him [22] so he attempted to remove his shoes without using his hands. As Johnson was doing this, Brock assaulted him by throwing Johnson down and starting to beat him. [23] Other officers ran into the room and without asking questions began to beat

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the booking area. They also testified that after being asked to remove his jewelry he angrily threw it on the counter piece by piece.

[21] Brock is employed by the Chilton County Sheriff's Department. The Court notes that according to defendants' testimony it was another employee of the chilton County Sheriff's Department, Driver, who took Johnson into the dress out room.

[22] Defendants dispute this fact.

[23] According to Driver, when he asked Johnson to remove his shoes, Johnson kicked a shoe at Driver which hit Driver in the leg below his knee and stepped toward Driver in an aggressive manner. Johnson has specifically denied kicking his shoe at anyone at the Chilton County Jail.

Johnson along with Brock. One officer held Johnson's legs down. Another was beating him on his back. Brock was hitting Johnson and chocking him. Johnson began to bleed on the floor and blood began to come out of his nose. Some of the officers started banging Johnson's shoes on the ground like they were looking for something in his shoes. Johnson cannot say with any certainty which officers other than Brock were involved in this beating, but he contends that every law enforcement who came into the dress out room was beating him. [24] In part Johnson attributes his inability to specifically identify officers other than Brock on the fact that he still had mace in his eyes. [25] Based on the testimony from defendants

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[24]Johnson does not appear to contend that either Wright or Ogilvie were involved in this beating at the Chilton County Jail.

[25]Although some of the law enforcement witnesses contend that Johnson was allowed to go outside to wash out his eyes with a garden hose when he arrived at the jail, Johnson contends that it was not until he was taken to the hospital later that he was helped to wash the mace out of his eyes.

in this case, the following people were in the dress out room with Johnson: Driver, Bland, Baker, Brock and Monroe [26]

Of course, these defendants contend that Johnson was disruptive, belligerent and aggressive and that they used the force necessary to subdue him. The defendants deny that Johnson was struck or beaten. Instead they contend that they were merely trying to restrain him from further aggressive behavior. Bland even testified that Johnson did not do anything that would call for any officer to strike or hit him.

At some point, the officers dragged Johnson out of the room and put him in some type of harness chair. According to Johnson he was in handcuffs during the entire time he was being beaten at the jail and he was still in

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[26]At the time of the incident, Monroe was employed as a detective with the City of Jemison Police Department. He was at the Chilton County Jail that night on an unrelated matter. Monroe admits that he participated in restraining Johnson. Driver, Bland, Brock, and Baker were at the time all employed by the Chilton County Sheriff's Department. Driver, Bland, and Baker were corrections officers and Brock was an investigator.

handcuffs when he was strapped into the harness chair. Unidentified officers continued to beat Johnson after he was strapped into the harness chair.

A law enforcement officer took Johnson to the hospital. Johnson has no complaints about this officer. After being examined at the hospital, Johnson was returned to the Chilton County jail where he remained until sometime the next morning. Prior to being allowed to leave the jail, Johnson was required to take a breathalyzer test. Johnson's wife picked him up and took him home. Johnson claims a variety of physical and emotional injuries arising from the events of May 25, 2002. Some of these injuries resulted in visible damage to his body which was photographed.

DISCUSSION

A. Untimely Service of Process

Ogilvie and Wright argue that they are entitled to summary judgment because they were not served with summons and complaint in this matter within the time

provided by Federal Rule of Civil Procedure 4(m). Earlier in the litigation, Ogilvie and Wright moved for dismissal of all claims against them based on Plaintiff's failure to serve them within 120 days of the filing of the complaint. This issue is one which can be and should be resolved by a motion to dismiss. Accordingly, this Court ruled on the service issue in its Memorandum Opinion and Order addressing th e motions to dismiss by Ogilvie and Wright. In so doing, this Court has fully considered the arguments made on this issue in the briefs submitted in support of and in opposition to the motions for summary judgment as well as the submissions on the motions to dismiss. It was the ruling of this court that the failure to timely serve was not an appropriate grounds for dismissal of the claims against these defendants. Moreover, the Court deemed it appropriate to exercise its discretion to extend Plaintiff's time for service. Accordingly, this Court finds that the motions for summary judgment is due to be DENIED.

B. Federal Claims Against Wright and Ogilvie

1. Action Under Color of Law

42 U.S.C. § 1983 provides a remedy when a person acting under color of state law deprives a plaintiff of a right, privilege, or immunity secured by the Constitution, laws, or treaties of the United States. *See e.g.*, 42 U.S.C. § 1983; [27] *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) ("§ 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred") (internal quotes omitted); *Cummings v. DeKalb* County, 24 F.

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[27] Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

3d 1349, 1355 (11th Cir. 1994).

Thus, to employ § 1983 to secure a remedy for a deprivation of a federally secured right, a plaintiff must generally show that the alleged deprivation was committed by a person acting under color of state law. *See e.g., West v. Atkins,* 487 U.S. 42 (1988); *Focus on the Family v. Pinellas Suncoast Transit Auth.,* 344 F. 3d 1263, 1276-77 (11thh Cir. 2003). Conversely, purely private conduct is not within the reach of the statute. *Focus on the Family,* 344 F. 3d at 1277. The "under color of law" requirement of § 1983 has consistently been treated as the same thing as the Fourteenth Amendment's state action requirement. *Focus on the Family, 344 F.3d at 1276-77 & n4.* "Section 1983's state action requirement applies regardless of the nature of the substantive deprivation being alleged." *Id.* at 1277.

The Eleventh Circuit has explained that

> The traditional definition of acting under Color of state law requires that the defendant in a § 1983 action exercised power possessed

> by virtue of state law and made possible only because the wrongdoer is clothed with The authority of state law.

West, 487 U.S. 42, 49 (1988) (internal quotations omitted). The Eleventh Circuit court of Appeals has employed three distinct tests in determining whether the actions of a private entity or individual are properly attributed to the state. The Eleventh Circuit has summarized these tests as follows:

> Previously, this circuit set forth the three primary tests the supreme court has used to determine whether state action exists: (1) the public function test; (2) the state compulsion test; and (3) the nexus joint action test. The public function test limits state action to instances where private actors are performing functions "traditionally the exclusive prerogative of the state." The state compulsion test limits state action to instances where the government "has coerced or at least significantly encouraged the action alleged to violate the Constitution." The nexus/joint action test applies where "the state has so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise." We must determine on a case-by-case basis whether sufficient state action is present from a non-state actor (defendant) to sustain a section 1983 claim.

Focus on the Family, 344 F.3d at 1277 (quoting *Willis v. University Health Servs., Inc.*, 993 F.2d 837, 840 (11th Cir. 1993).

Ogilvie argues that he cannot be subject to liability under 42 U.S.C. § 1983 because he is not a "state actor."[28] In his initial motion for summary judgment, Ogilvie seemed to argue that membership in the Boy Scouts of America does not make Ogilvie a state actor for purposes of § 1983. In support of this argument, he invokes several cases which held that the boy Scouts of America and its members are not state actors for purposes of liability under § 1983. This argument is a bit bizarre because Ogilvie admitted in his deposition that he was not a member of the Boy Scouts of America. It is true that he was a participant in the Explorer Program and that the boy Scouts of America had some

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[28]All other remaining defendants appear to concede that they were acting under color of law as they were performing their duties as law enforcement officers for either chilton county, the City of Clanton, or the city of Jemison.

involvement in assisting in the coordination of that program for the city of Clanton Police Department, but Johnson has never predicated his contention that Ogilvie could be liable under § 1983 on an argument that Ogilvie was a member of the Boy Scouts of America. Moreover, the Court finds that the cases on which Ogilvie relies cannot support a contention that the fact that Boy Scouts of America are involved in a program means that the participants in the program can never be state actors for purposes of § 1983 with any consideration of what the participants were doing in the program.

Not surprisingly, in opposition to Ogilvie's motion for summary judgment, Johnson contends that it was Ogilvie's actions which make him a state actor, not his mere participation in a program to which the Boy Scouts of America has some connection. This contention is consistent with the allegations against Ogilvie in the Amended

Complaint. [29] The specific actions that Johnson cites are: that Ogilvie was issued a uniform with a cloth badge which he wore; that Ogilvie went on "ride alongs" with police officers; that Ogilvie carried a concealed baton; that Ogilvie had previously handcuffed arrestees and participated in the use of force during arrests; that Johnson participated in the arrest of Johnson. Moreover, Johnson notes that the Explorer program is administered by the City of Clanton Police Department which held meetings for participants in the program, including meetings at which training was provided. The City

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[29]Specifically, the Amended Complaint alleges that Ogilvie was "duly appointed and acting as [a] Police Officer for the city of Clanton" and as such was acting under color of law by enforcing the laws of Alabama. Am. Compl. At ¶ 14. The Amended Complaint further alleges that Ogilvie was an agent or employee of the City of Clanton, Alabama and was acting in the course and scope of his agency or employment. Id. At ¶ 15. It is further alleged that immediately before beating Plaintiff, Ogilvie had been riding in a police car. Id. At ¶ 22. It is alleged that Ogilvie beat Plaintiff with a nightstick after Plaintiff was placed in handcuffs and told he was under arrest. Id. At ¶ 24. Finally, it is alleged that Ogilvie participated in arresting Plaintiff and transporting him to the jail after his arrest. Id. at ¶ 26.

of Clanton Police Department reviewed participants in the program and specifically authorized them to ride along with police officers. The Court also notes that Ogilvie threatened to arrest Johnson's wife and while he later admitted that he could not do so the threat itself shows an attempt to exercise police power. The City of clanton Police Department promulgated rules for Explorers to follow while on ride alongs with police officers. These rules mandate that Explorers will carry handcuffs.

It is important to note that the City of Clanton Police Department had specifically authorized Ogilvie to wear an official Explorer uniform, to ride in police vehicles on patrol with regular officers for the City of Clanton Police Department and to assist in arrests and perform other police functions. Moreover, it is undisputed that Ogilvie came to be involved in the events leading to the allegations against him solely because of his participation in a ride along on the evening of May 25, 2002 and his direct and active

participation in the arrest of Johnson. Thus, Ogilvie was a willful participant in joint action with the City of Clanton Police Department and Wright, an on-duty officer of the City of Clanton Police Department. Accordingly, sufficient evidence exists that, if credited, would establish that Ogilvie engaged in conduct for which he may be subjected to liability under § 1983. This finding precludes the entry of summary judgment in Ogilvie's favor on all claims against him pursuant to § 1983 to the extent that his motion is premised on a contention that he was not acting under color of state law.

2. Plaintiff's Claim that Ogilvie and Wright violated the Fourth Amendment

At this juncture in the case, Johnson has only two claims against Ogilvie and Wright pursuant to 42 U.S.C. § 1983. Those claims challenge the propriety of Johnson's arrest and the alleged excessive nature of the force used to

effectuate that arrest. [30] Both types of claims are cognizable violations of fourth Amendment rights.

A. Excessive Force

All claims that law enforcement officers have used excessive force in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are analyzed under the Fourth Amendment's reasonableness standard. *See e.g., Graham v. Connor,* 490 U.S. 385, 395 (1989). Whether the force is reasonable hinges on the facts and circumstances of each case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. At 396.

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[30]In the motions for summary judgment filed by Ogilvie and Wright they reiterate a number of the arguments from their motion to dismiss which attack the sufficiency of the allegations of the federal claims against them in the Amended Complaint. The Court has fully addressed these arguments in its ruling on the motions to dismiss and will not repeat itself in this Memorandum Opinion and Order.

The "reasonableness" of the use of forc3 must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Id. The "calculus of reasonableness" must embody allowance for the fact that police officers are often forced to make split-second judgments in tense, uncertain, and rapidly changing situations. Id. At 396-97.

The Eleventh Circuit Court of Appeals has interpreted the Supreme Court's language in *Graham* as requiring the balancing of three factors in determining whether the force applied was reasonable. *Draper v. Reynolds,* 369 F.3d 1270, 1277-78 (11th Cir. 2004). These factors are the need for the application of force, the relationship between the need and amount of force used, and the extent of the injury inflicted. Id. The application of *de minimus* force, without more, will not violate the Fourth Amendment's prohibition against the use of excessive force. *See, e.g., Nolin v. Isbell,* 207 F.3d 1253, 1257 (11th Cir. 2000).

Viewing the facts before this Court in the light most favorable to Plaintiff, all the *Graham* factors weigh in favor of Plaintiff. The facts viewed in the light most favorable to Plaintiff show that Johnson was doing nothing more than attempting to enter his vehicle in the parking lot of a bar when he was confronted by Wright and Ogilvie. Wright verbal abused Johnson and threatened to arrest him. Wright also yelled at Johnson's wife and threatened to arrest her. All the while, Johnson insisted that he and his wife had not done anything and could not be arrested. Wright yelled that Johnson was under arrest. When Johnson simply inquired about the nature of the charges, Wright sprayed Johnson with mace, struck him with a baton causing Johnson to fall onto the parking lot, and beat Johnson even after he had been handcuffed. Ogilvie participated in striking Johnson with a baton several times after he was handcuffed. Ogilvie and Wright caused Johnson's head to be slammed into the paved parking lot. This blow to the head resulted in a wound that

bled. There is nothing in these facts, if credited by the jury, that would support the inference that Johnson posed a significant threat to the safety of himself, Wright, Ogilvie or others. Examining the application of the Eleventh Circuit's articulation of the *Graham* factors to the instant case, it is not apparent from the evidence before the Court that Wright and Ogilvie necessarily needed to apply the degree of force allegedly used. Because the weighing of the relevant factors balances in favor of Johnson, the Court finds that Johnson has stated a claim pursuant to 42 U.S.C. § 1983 arising out of the use of excessive force in violation of the fourth Amendment and offered sufficient evidence in support of that claim to preclude the entry of summary judgment for Ogilvie and Wright.

b. False Arrest/Unreasonable Seizure

False arrest claims under § 1983 are analyzed solely as unreasonable seizure claims under the Fourth Amendment and not as claims for deprivation of due process under the

Fourteenth amendment. *See e.g., Albright v. Oliver,* 510 U.S. 266, 274 (1994); *Hamm v. Powell,* 893 F.2d 293, 294 (11th Cir. 1990). "A warrantless arrest without probable cause violates the Constitution and forms the basis for a section 1983 claim." *Marx v. Gumbinner,* 905 F.2d 1503, 1505 (11th Cir. 1990). Where probable cause for an arrest exists, however, no false arrest claim pursuant to section 1983 is viable. Id. At 1505-06.

> Probable cause [to arrest] exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthly information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Probable cause does not require overwhelmingly convincing evidence, but only reasonably trustworthy information, and probable cause must be judged not with clinical detachment but with a common sense view to the realities of normal life. When the facts are not in dispute, whether probable cause existed is a question of law.

Id. At 1506 (internal citations and quotations omitted).

If the facts are viewed in the light most favorable to Johnson, a reasonable jury could find that Wright and Ogilvie

arrested Johnson without a warrant and without probable cause. Accordingly, the Court finds that Plaintiff has stated a claim pursuant 42 U.S.C. § 1983 for alleged violations of his rights under the fourth Amendment to be free from unlawful arrest and unreasonable seizure and properly supported it with sufficient evidence to defeat the motions for summary judgment filed by Wright and Ogilvie.

Thus, this court finds that there is evidence before this Court which, if credited, could support Johnson's contentions that these rights were violated. For this reason, the Court is satisfied that Johnson has established that he was deprived of rights actually secured by the United States Constitution. While Ogilvie argues that the force he used to assist in effectuating the arrest was not excessive, his contention is predicated on a version of facts which ignores facts favorable to Johnson. Similarly, Ogilvie argues that he did not arrest or seize Johnson and could not have done so. Again, this argument is predicated on facts in dispute. When the facts

are viewed in the light most favorable to Johnson, the Court finds sufficient evidence from which a reasonable jury could find that Ogilvie seized or arrested Johnson without probable cause. Given the procedural posture of the case, this Court cannot agree with Ogilvie that he is entitled to summary judgment because he contends he did not use excessive force and did not arrest or seize Johnson.

3. Qualified Immunity for Ogilvie and Wright

Defendants Ogilvie and Wright argue that the doctrine of qualified immunity bars Plaintiff's claims of excessive force and unlawful arrest. "Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). *Accord, Hope v. Pelzer*, 536 *U.S. 730 (2002).* "The purpose of this immunity

is to allow government officials to carry out their discretionary duties without fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro,* 284F.3d 1188, 1194 (11th Cir.2002) (internal quotation marks and citations omitted). *See also Wood v. Kesler,* 323 F3d 872 (11th Cir. 2003).

a. Discretionary Authority

To receive qualified immunity, "the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful actions occurred." Id. (Internal quotation marks omitted). Based on the allegations of the case it would appear that Wright and Ogilvie were so acting.

b. Constitutional Violation

The next step in the qualified immunity analysis is the determination of whether the plaintiff's allegations, if true, establish a constitutional violation. "The threshold inquiry a

court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer,* 536 U.S. 730 (2002) (citing *Saucier v. Katz,* 533 U.S. 194, 201 (2001)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier,* 533 U.S. at 201.

In the instant case, the Court has already found that Plaintiff's allegations and evidence could support a violation of the Fourth Amendment's prohibition against the use of excessive force or the Fourth Amendment's prohibition against unlawful arrest or unreasonable seizure. The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the rights to be free from the use of excessive force in the course of arrest and the right to be free from arrest without probable cause. In the context of the qualified immunity analysis, the question is whether the

officer's conduct is objectively reasonable in light of the facts confronting the officer. *Vinyard*, 311 F.3d at 1347. Thus, for the excessive force claim, this Court must ask whether a reasonable law enforcement officer would believe that the level of force used was necessary in the situation at hand. *Id.* Similarly for the unlawful arrest/unreasonable seizure claim, the Court must ask whether a reasonable law enforcement officer would have believed he had arguable probable cause to arrest.[31]

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[31] Qualified immunity applies when there was arguable probable cause for an arrest even if actual probable cause did not exist. *Jones v. Cannon*, 174F.3d 1271, 1283 n. 3 (11th Cir. 1999) ("Arguable probable cause, not the higher standard of actual probable cause governs the qualified immunity inquiry."). Hence, "[i]n the context of a wrongful arrest claim, an officer will be protected by qualified immunity if he had arguable probable cause to effectuate the arrest. *Brown v. Head*, 228 F. Supp. 2d 1324, 1328 (M.D. Ala. 2002) (internal quotations and citation omitted). Arguable probable cause exists if, under all of the facts and circumstances, an officer reasonably could - not necessarily would - have believed that probable cause was present. *Durruthy v. Pastor*, 351 F.3d 1080, 1089 (11th cir. 2003) ("Arguable probable cause exists when an officer reasonably could have believed that probable cause existed, in light of

Viewing the facts in a light most favorable to Plaintiff, Wright and Ogilvie did not have arguable probable cause to arrest Plaintiff. Plaintiff has produced evidence from which a reasonable jury could find that he did not engage in the conduct for which he was arrested. Although Wright and Ogilvie have produced evidence to the contrary, this court would be exceeding its authority if it rendered a decision at this stage of the litigation on the credibility and veracity of the conflicting evidence. Because Plaintiff has

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the information the officer possessed.") (internal marks and citation omitted); *Montoute v. Carr,* 114F.3d 181, 184 (11th Cir. 1997) ("In order to be entitled to qualified immunity from a Fourth Amendment claim, an officer need not have actual probable cause but only 'arguable probable cause,' i.e., the facts and circumstances must be such that the officer reasonably could have believed that probable cause existed."); *Brown,* 228 F. Supp. 2d at 1328 ("Arguable probable cause exists when reasonable police officers, in the same circumstances and possessing the same knowledge as the Defendant, could have believed that there was probable cause to make a warrantless arrest.") (citation omitted). This inquiry is objective as the Court must ask whether the officer's actions were objectively reasonable regardless of the officer's underlying motivation or intent. *Montoute,* 114 F.3d at 183.

established a violation of his Fourth Amendment rights, based on his version of the facts, the Court will now move to the second step of the qualified immunity inquiry.

Because the alleged conduct violated constitutional rights, the next step of the inquiry is to determine whether the rights at issue were "clearly established." *Vinyard,* 311 F.3d at 1349. As the Eleventh Circuit Court of Appeals put it, "[i]f a constitutional right would have been violated under the plaintiff's version of the facts, 'the next , sequential step is to ask whether the right was clearly established.'" Vinyard, *311 F.3d at 1346 (*quoting Saucier, 553 U.S. at 201). In so doing, a court must do more than just compare the facts of the instant case to prior cases to determine if a right is clearly established; it must also assess whether the facts of the instant case fall within statements of general principle found in appropriate precedent. *See, e.g., Hope,* 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates law even in novel factual circumstances. Indeed, in [*United*

States v.]Lanier [,520 U. S. 259 (1997)], we expressly rejected a requirement that previous cases be 'fundamentally similar.'"')' *Holloman,* 370 F.3d at 1278; *Vinyard,* 311 F.3d at 1351. Indeed, the "salient question ... is whether the state of the law ... gave [the officers] *fair warning* that their alleged treatment [of the plaintiff] was unconstitutional." *Hope,* 536 U.S. at 741.

Officials sued pursuant to § 1983 have a right to fair notice. Id. At 739. This notice can be given in three ways. *Vinyard*, F.3d at 1350-53. First, the words of the federal statute or constitutional provision may in themselves be specific enough to establish clearly the law applicable to particular conduct and circumstances to overcome qualified immunity, even in the total absence of case law. Id, at 1350. Second, preexisting case law may serve to provide fair notice. Id. at 1351. Case law need not arise out of factually identical situations to clearly establish law for purposes of the qualified immunity analysis. Id. At 1351. Broad legal

principles established in case law may serve to clearly establish the law even for cases arising out of factually different situations. Id. Third, in the absence of case law with broad holding sufficient to provide fair notice, fact specific precedents may serve to clearly establish the law arising out of materially similar factual circumstances. Id. At 1351-52.

The Eleventh Circuit has previously found in some cases that the Fourth Amendment itself is sufficiently clearly to establish that certain conduct violates the protections of that provision. Specifically, it has observed that in the Fourth Amendment context, it has sometimes found violations of the fourth Amendment in excessive force cases involving conduct "far beyond the hazy border between excessive and acceptable force" even in the absence of prior case law. *Vinyard*, 311 F. 3d at 1350 n.18.

Cases in which the language of the Fourth Amendment itself has been sufficient to put the officer on

notice that his conduct was in violation of the law appear to be cases involving the use of significant force after an arrestee has been subdued. Id. For example, beating a suspect, kicking a suspect, or slamming the head of a suspect the ground is conduct which deprives the law enforcement officers of qualified immunity when the suspect was handcuffed and did not struggle or resist the officers in any way and did not attempt to flee. *Slicker v. Jackson*, 215 F.3d 1225, 1232-33 (11th Cir. 2000).

Similarly, there can be no question that an arrest without probable cause to believe a crime has been committed violates the Fourth Amendment. *See e.g., Von Stein v. Brescher*, 904 F2d 572, 579 (11th Cir. 1990). Indeed, the Eleventh Circuit has repeatedly held that this legal tenant is "clearly established" for purposes of addressing qualified immunity claims by public officials. *See e.g., Id.; Herren v. Boyer*, 850 F2d 1543, 1547 (11th Cir. 1988). See also Babers v. City of Tallasee, *152 F. Supp. 2d 1298, 1304 (M.D. Ala.*

2001).

In light of the foregoing, the Court is persuaded that Wright and Ogilvie had fair warning that the conduct in which they were allegedly engaged violated the Fourth Amendment's prohibitions on excessive force and arrest without probable cause. Moreover, the Court finds that genuine issues of material fact preclude summary judgment in favor of Wright and Ogilvie on the basis of qualified immunity. Accordingly, the motions for summary judgment by Wright and Ogilvie are due to be DENIED to the extent that they are based on qualified immunity.

4. 42 U.S.C. § 1988

Moreover, the motions for summary judgment by Wright and Ogilvie both include arguments that Plaintiff's claims pursuant to 42 U.S.C. § 1988 must fail because Plaintiff has no viable claims pursuant to 42 U.S.C. § 1983. Obviously, given this Court's ruling that there exist triable issues on Plaintiff's claims pursuant to 42 U.S.C. §1983,

there can be no summary judgment granted on Plaintiff's claims pursuant to 42 U.S.C. § 1988.

C. Federal Claims Against Driver, Brock, Bland, Baker, and Monroe

1. Official Capacity Claims

Although it appears to this Court that the Amended Complaint brings only claims against the named defendants in their individual, and not their official capacities, the defendants have had some concern about the existence of official capacity claims in this action. At the pretrial conference held on July 12, 2005, all parties agreed that the only remaining claims in this action are claims against the named defendants in their individual capacities and that there are no official capacity claims in this action. Accordingly, the motion for summary judgment by Driver, Brock, Bland, and Baker on claims against them in their official capacities is due to be DENIED as MOOT.

2. Individual Capacity Claims

According to Plaintiff's testimony, Driver, Brock, Bland, Baker, and Monroe participated in beating him in the dress out room of the Chilton County Jail. This beating occurred after Plaintiff had been arrested and transported to the Chilton County Jail by Wright and Ogilvie and during the time he was being processed. In fact, the beating took place when Plaintiff was taken into the dress out room to change out of his clothes. It is undisputed that Driver, Brock, Bland, Baker, and Monroe [32] were in the dress out room and attempting to subdue Plaintiff. Plaintiff contends that all of the law enforcement officers in the dress out room beat him while he was handcuff. Plaintiff further contends that this beating was unprovoked. Driver, Brock, Bland, Baker and Monroe have disputed Plaintiff's account of the events in the

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[32]Monroe was present at the Chilton County jail on May 26, 2005, after having taken a suspect into custody during a drug related offense. At that time, Monroe, who is sued only in his individual capacity as a detective for the City of Jemison Police Department.

dress out room.

a. Fourth Amendment False Arrest/Unlawful Seizure Claim

Driver, Brock, Bland, Baker, and Monroe contend that they are entitled to summary judgment on Plaintiff's claims that his Fourth Amendment rights to be free from false arrest and unlawful seizure because they did not participate in his arrest and seizure at the Skylight Bar. Plaintiff has not created any genuine issue as to any fact material to this particular argument. Indeed, Plaintiff has not addressed this argument in any of his submissions in opposition to summary judgment. Nevertheless, this Court must ascertain whether on the undisputed facts, Driver, Brock, Bland, Baker and Monroe are entitled to judgment as a matter of law on these claims. Because a requisite element of such claims is an arrest or seizure and Plaintiff cannot show that any of these defendants participated in his arrest or seizure, the court agrees that they are entitled to judgment as

a matter of law. Accordingly, the motions for summary judgment by Driver, Brock, Bland, Baker and Monroe are due to be GRANTED to the extent that they seek summary judgment on Plaintiff's claims against them in their individual capacities pursuant to 42 U.S.C. § 1983 for alleged violations of Plaintiff's Fourth Amendment rights to be free from unreasonable seizures or arrest without probable cause.

b. Fourth Amendment - Excessive Force Claim

Plaintiff's claims against Driver, Brock, Bland, Baker, and Monroe for what he contends was a beating in the dress out room of the Chilton County Jail are properly analyzed as claims of excessive force in violation of Plaintiff's rights under the Fourth Amendment to the United States Constitution. *See, e.g., Calhoun v. Thomas,* 360 F. Supp.2d 1264 (M.D. Ala. 2005) (Thompson, J.). Driver, Brock, Bland, Baker, and Monroe all contend that qualified immunity shields them from liability for this claim. Plaintiff disagrees.

As previously explained, the doctrine of qualified immunity insulates government agents from personal liability for money damages in certain circumstances. The test for qualified immunity hinges on whether the officials' conduct was objectively reasonable in light of established law. The first step in the qualified immunity inquiry is a showing by the defendant official that he was acting within the scope of his authority and performing his employment duties. This step is easily established in this case. Indeed, plaintiff does not take issue with the contention that Driver, Brock, Bland, Baker and Monroe were acting within the scope of their discretionary authority at the time of the alleged application of force. Thus, the court will now address whether Plaintiff has adequately show a violation of a constitutional right that was clearly established at the time of the incident.

In analyzing an excessive force claim, the Court must evaluate whether the defendants' actions were objectively reasonable in light of the totality of the circumstances

confronting the defendants, without regard to their underlying intent or motivation. Graham, 490 U.S. at 396. As outlined earlier in this Memorandum Opinion and Order, the Court must perform a reasonableness calculus looking to the circumstances under which the force was applied, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Garrett v. Athens-Clarke County,* 378 F.3d 1274, 1279 (11th Cir. 2004).

The claim here is that Driver, Brock, Bland, Baker and Monroe beat Plaintiff while he was handcuffed and in an interior room in the Chilton County Jail. A reasonable jury could find that this beating occurred after Plaintiff did nothing more innocuous than attempting to remove his shoe upon being directed to do so. Of course, the Court is mindful that these facts are hotly disputed by these defendants. Nevertheless, the Court cannot weigh the evidence at this

stage in the litigation, nor can it engage in credibility determinations. When the facts are viewed in the light most favorable to Plaintiff, the non-movant, this Court must conclude that the conduct at issue easily rises to the level of a violation of Plaintiff's clearly established constitutional right to be free from the application of excessive force. Accordingly, Driver, Brock, Bland, Baker and Monroe are not entitled to summary judgment on the basis of qualified immunity, nor are they entitled to summary judgment on the basis of a contention that the evidence does not support a finding that Plaintiff has established a violation of his fourth Amendment rights. Accordingly, the motions for summary judgment of Driver, Brock, Bland, Baker and Monroe are due to be DENIED to the extent that they are based on such arguments.

E. State Law Claims[33] Against Wright and Ogilvie

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[33]Ogilvie and Wright argue that this court should decline to exercise supplemental jurisdiction over the claims

1. Immunity under the Volunteer Service Act

Ogilvie contends that is immune from Plaintiff's Alabama law claims under the Volunteer Service Act and seeks summary judgment on such claims against him on the basis of this immunity. Alabama has enacted a Volunteer Service Act which provides for immunity to volunteers in some circumstances. *See* Ala. Code § 6-5-336 91975). Pursuant to the Volunteer Service Act,

> Any volunteer shall be immune from civil liability in any action on the basis of any act or omission of a volunteer resulting in damage or injury if: (1) the volunteer was acting in good faith and within the scope of such volunteer's official functions and duties for a nonprofit organization, a nonprofit corporation, hospital, or a government entity; and (2) the damage or injury caused was not caused by

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against them pursuant to Alabama law. This Court has considered the factors relevant to the determination of whether it should exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 and finds it is appropriate for it to exercise its discretion to hear all the claims together in one action. Accordingly, to the extent that their motions for summary judgment are predicated on a contention that this court should decline to exercise supplemental jurisdiction over the state law claims, the motion are DENIED.

willful or wanton misconduct by such volunteer.

Ala. Code § 6-5-3369d) (1975). The volunteer Service Act defines "volunteer" as "[a] person performing services for a nonprofit organization, a nonprofit corporation, a hospital, or a government entity without compensation, other than reimbursement for actual expenses incurred." Ala. Code § 6-5-336(c)(4) (1975). For purposes of this statute, a governmental entity includes a municipality such as the City of Clanton. Ala. Code § 6-5-336(c)(1) (1975).

Given the procedural posture of this case, this Court must refrain from resolving factual disputes and must view the evidence in the light most favorable to Plaintiff. When the facts and the reasonable inferences which can be drawn from them are viewed in the light most favorable to Johnson, this Court cannot find that Ogilvie is entitled to the protection of the Volunteer Services Act. The immunity provided to volunteers pursuant to the Volunteer Services Act is limited to good faith actions and cases in which the damage or injury

was not caused by willful or wanton misconduct by the volunteer. While the evidence regarding this issue is in dispute, the evidence viewed in the light most favorable to Plaintiff establishes evidence from which a reasonable jury could find that Ogilvie's conduct was outside of the protections of the volunteer Services Act. Accordingly, to the extent that Ogilvie summary judgment on the basis of the immunity provided by the Volunteer Services Act, his motion it DENIED. **2. Discretionary function immunity for Wright and Ogilvie**

Wright and Ogilvie asserts that, pursuant to the discretionary function or state-agent immunity provided by *Ala. Code* § 6-5-338 (1975),[34] they are entitled to prevail on

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[34] Section 6-5-338 provides in pertinent part as follows:

(a) Every peace officer, except constables, who is employed or appointed pursuant to the Constitution or statutes of this state, whether appointed or employed as such peace officer by the state or a county or municipality thereof, or by an agency or institution, corporate or otherwise, created pursuant to the Constitution or laws of this state and

Plaintiff's state law claims. The Alabama legislature has granted statutory immunity from tort liability to municipal police officers for "conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties." *Ala. Code* § 6-5-338(a) (1975). Such immunity shields a state agent from suit in his or her personal capacity for claims based upon "exercising judgment in the enforcement of the criminal laws of this State, including but not limited to, law-enforcement officers'

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authorized by the Constitution or laws to appoint or employ police officers or other peace officers, and whose duties prescribed by law, or by the lawful terms of their employment or appointment, include the enforcement of, or the investigation and reporting of violations of, the criminal laws of this state, and who is empowered by the laws of this state to execute warrants, to arrest and to take into custody persons who violate, or who are lawfully charged by warrant, indictment, or other lawful process, with violations of, the criminal laws of this state, shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties.

Ala. Code § 6-5-338 (1975).

arresting or attempting to arrest persons(.)" *Ex parte Cranman*, 792 So.2d 392, 405 (Ala. 2000).[35] No immunity is available, however, "when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law." *Id.* Therefore, state-agent immunity shields Wright and Ogilvie[36] from tort liability except to the extent that their treatment of Plaintiff could reasonably be said to have been willful or malicious conduct or conduct engaged in bad faith.[37]

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[35] The Alabama Supreme Court has recently refined its standard for entitlement to discretionary function immunity, otherwise known as state-agent or state-function immunity. In *Ex parte Butts*, 775 So.2d 173 (Ala. 2000), the court adopted as its position the "restatement" of the law of state-agent immunity that was advanced by a plurality in *Ex parte Cranman*, 792 So.2d 392 (Ala. 2000).

[36] The Court will assume *arguendo* that Ogilvie could claim this immunity. The Court notes, however, that there in no authority for his claim of entitlement to this immunity.

[37] This Court is mindful that qualified immunity under federal law and state-agent immunity under Alabama law are not identical; federal immunity employs an objective, reasonable-officer standard, while state immunity is a subjective inquiry into what the defendant officers actually

Under the circumstances in this case, the Court believes that a jury could reasonably determine that the treatment Plaintiff received at the hands of Wright and Ogilvie was willful, malicious and in bad faith. *See, e.g.*, *Wright v. Wynn*, 682 So.2d 1, 2 (Ala. 1996); *Franklin v. City of Huntsville*, 670 So.2d 848, 853 (Ala. 1995). The evidence, viewed most favorably to Plaintiff, suggests that Ogilvie and Wright had no grounds to believe Plaintiff had committed any offense whatsoever, but rather simply did not like Plaintiff questioning their authority, disagreeing with them about the source of the liquid in the puddle in the parking lot, or verbalizing criticism towards them. Consequently, the subsequent arrest of Plaintiff was unjustified and supports an inference of action with malice. Plaintiff has offered

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believed. *See Scarbrough v. Myles*, 245 F.3d 1299, 1303 n.9 (11th Cir. 2001) (contrasting standards for award of immunity). Consequently, a federal court's finding that defendants are entitled to qualified immunity as to federal claims does not always compel the conclusion that the defendants are entitled to Alabama state-agent immunity.

evidence from which a reasonable jury could find that Wright and Ogilvie used excessive and unreasonable force against Plaintiff in the course of Plaintiff's arrest. On this evidence, the Court cannot find, as a matter of law, that the conduct of Wright and Ogilvie was not malicious or taken in bad faith. Accordingly, the Court must find, at this stage, that neither Wright nor Ogilvie are entitled to state-agent immunity in relation to Johnson's claims. Accordingly, to the extent that the motions for summary judgment filed by Wright and Ogilvie are predicated on discretionary function immunity, they are due to be DENIED.

3. Assault and Battery Claims Against Wright and Ogilvie

Count Four and Count Five of the Amended Complaint set forth claims pursuant to Alabama law for assault and battery. These claims are predicated on the allegations that Wright and Ogilvie beat Plaintiff while he was handcuffed and slammed his hand onto the parking lot.

In support of their motions for summary judgment, Ogilvie and Wright argue that they did not commit the torts of battery or assault. Specifically they argue that to establish these claims Plaintiff must show that Wright and Ogilvie acted unlawfully and that Plaintiff cannot do so. Once again genuine issued of material fact preclude judgment as a matter of law in favor of Wright and Ogilvie. Under Alabama law, a plaintiff seeking to recover for the tort of assault must show an intentional unlawful offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt, it not prevents. *See, e.g., Wood v. Cowart Enters., Inc.*, 809 so.2d 835, 837 (Ala.Civ.App. 2001). With regard to battery, a plaintiff must establish that the defendant touched him, that the touching was intentional, and the touching was conducted in an harmful or offensive manner. *See, e.g., Ex parte Atmore*

Cmty. Hosp., 719 So.2d 1190, 1993 (Ala. 1998). When the evidence is viewed in the light most favorable to Plaintiff, the Court finds that a reasonable jury could find in Plaintiff's favor on those two state law claims. Accordingly, the motions of Ogilvie and Wright are due to be DENIED to the extent that they seek summary judgment on the claims of assault and batter.

4. False Arrest and False Imprisonment Claims Against Wright and Ogilvie

Count Seven of the Amended Complaint sets forth a claim pursuant to Alabama law for "false arrest / false imprisonment." This claim is predicated on Plaintiff's allegation that Ogilvie and Wright "detained [him], prohibited him from leaving, circumscribed his physical liberty, ordered him and compelled him to go from place to place without a warrant and with neither reasonable suspicion nor probably cause to do so." Am. Compl. at ¶ 60. Plaintiff further alleges that he was falsely arrested and imprisoned.

Am. Compl. at ¶¶ 61-62.

In support of their motions for summary judgment, Ogilvie and Wright argue that they did not commit the torts of false arrest or false imprisonment. Specifically they argue that to establish these claims Plaintiff must show that Wright and Ogilvie acted unlawfully and that Plaintiff cannot do so. Plaintiff has explicitly stated he has abandoned any state law claim for false arrest. (Doc. # 116 at p. 19). Given that the false arrest claim and the false imprisonment claim were articulated in the same count as one claim and that Plaintiff has made no response whatsoever in opposition to the motions for summary judgment by Ogilvie and Wright on the false imprisonment claim, the Court understands Plaintiff's statement to include not only his false arrest claim, but also his false imprisonment claim. Accordingly, the motions for summary judgment by Wright and Ogilvie are due to be GRANTED to the extent that they seek judgment in favor of Wright and Ogilvie on all claims set forth in Count Seven of

the Amended Complaint.

F. State Law Claims Against Driver, Brock, Bland, and Baker

Plaintiff has included a number of claims pursuant to Alabama law in the Amended Complaint. To the extent that these claims are brought against, Driver, Brock, Bland, and Baker, they contend that they are immune from suit pursuant to Alabama law under Article I § 14's sovereign immunity provisions, courts applying Alabama law have routinely held that sheriffs and their deputies are executive officers of the State of Alabama who, with a few exceptions, are absolutely immune from suit on state law claims. *See, e.g., Tinney v. Shores*, 77 F.3d 378, 383 (11th Cir. 1996) ("Under Alabama law, sheriffs and deputy sheriffs, in their official capacities and individually, are absolutely immune from suit when the action is, in effect, one against the state.").[38]

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[38] In surveying Alabama law regarding the outer limits of sovereign immunity for sheriffs, the Eleventh Circuit has

The only exceptions to state sovereign immunity for a

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observed some confusion in Alabama courts, such that there is "no clear answer" as to whether sovereign immunity protects sheriffs or deputies sued in their individual capacities for malicious or intentional wrongdoing. *See, e.g., McMillian v. Johnson*, 101 F.3d 1363, 1364-65 (11th Cir. 1996) (collecting Alabama cases and noting inconsistencies). However, this Court need not be troubled by such uncertainty, because the *McMillian* court, applying *tinney*, has adopted an unambiguous interpretation of Alabama law, pursuant to which "a claim against an Alabama sheriff in his individual capacity is barred by the doctrine of sovereign immunity," even if that claim is based on malicious or intentional wrongdoing. *McMillian*, 101 F.3d at 1365 (reversing trial court finding that sheriff was not entitled to immunity for individual-capacity claims of malicious prosecution, abuse of process and outrage): *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1430 (11th Cir. 1997) ("Under Alabama law, a claim against an Alabama sheriff in his individual capacity is barred by the doctrine of sovereign immunity."); *Adams v. Franklin*, 111 F. Supp. 2d 1255, 1272-73 (M.D. Ala. 2000) (finding that state law claims seeking monetary damages from sheriff and deputies in individual capacities for assault and batter, negligence, intentional infliction of emotional distress, and outrage were barred by sovereign immunity doctrine, pursuant to *Tinney*). Thus, this Court is subject to a binding interpretation of Alabama law under which sheriffs and their deputies are absolutely immune from state law claims in their individual and official capacities, even if they are sued for actions that are malicious, intentional or otherwise outside the scope of their authority.

sheriff or deputy are "actions brought (1) to compel him to perform his duties, (2) to compel him to perform ministerial acts, (3) to enjoin him from enforcing unconstitutional laws, (4) to enjoin him from acting in bad faith, fraudulently, beyond his authority, or under mistaken interpretation of the law, or (5) to seek construction of a statute under the Declaratory Judgment Act if he is a necessary party for the construction of the statute." *Parker v. Amerson*, 519 So.2d 442, 443 (Ala. 1987). These exceptions manifestly do not apply where a sheriff is being sued for money damages, rather than for injunctive relief. *See Tinney*, 77 F.3d at 383 ("under Article I, § 14, th only exceptions to a sheriff's immunity from suit are actions brought to enjoin the sheriff's conduct," not actions for damages).

It is undisputed that Plaintiff's claims against Driver, Brock, Bland, and Baker pursuant to Alabama law are brought against them individually and in other official capacities as Deputy Sheriffs of Chilton County for their

alleged acts and omissions as such. It is equally clear that the Amended Complaint demands compensatory and punitive damages as well as attorneys' fees and costs. While the Complaint also includes a request for a declaratory judgment that the policies and practices complained of are unlawful and in violation of the United States Constitution, this declaratory relief relates to Plaintiff's claims pursuant to 42 U.S.C. § 1983 and not his state law claims. Moreover, it does not bring the claims against these defendants outside of the protections of Article I, § 14. Furthermore, Plaintiff has not maintained that any of the *Parker* exceptions apply; indeed he cannot credibly do so, inasmuch as she is plainly suing these defendants for money damages, not injunctive relief. Accordingly, Driver, Brock, Bland, and Baker are entitled to judgment as a matter of law on all of Plaintiff's claims against them pursuant to Alabama law and their motion for summary judgment on those claims is due to be GRANTED.

G. State Law Claims Against Monroe

Monroe seeks summary judgment on Plaintiff's state law claims against him for assault, battery, negligence and false imprisonment on the basis of discretionary function immunity. Genuine issues of material fact preclude judgment as a matter of law on this basis. Additionally, Monroe argues that Plaintiff cannot establish the required elements of a claim of assault under Alabama law. The Court finds that genuine issues of material fact preclude judgment as a matter of law on this basis as well. Accordingly, Monroe's motion for summary judgment is due to be DENIED to the extent that it seeks summary judgment on Plaintiff's claims against him pursuant to Alabama law.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED as follows:

(1) Officer Dewayne Wright's Motion for Summary Judgment (doc. # 87) is DENIED in part and GRANTED in

part as set forth above.

(2) Samuel Ogilvie's Motion for Summary Judgment (Doc. # 84) is DENIED in part and GRANTED in part as set forth above.

(3) Motion for Summary Judgment filed on April 12, 2005 by Defendants Kevin Driver, Stephen Brock, Robert Bland, and Nick Baker (Doc. # 76) is DENIED in part and GRANTED in part as set forth above.

(4) To the extent that Defendants', Mark Bass and Robert Monroe's [sic] Motion for Summary Judgment (Doc. # 120) seeks summary judgment on behalf of Mark Bass it is DENIED as MOOT.

(5) To the extent that Defendants', Mark Bass and Robert Monroe's [sic] Motion for Summary Judgment (Doc. # 120) seeks summary judgment on behalf of Robert Monroe it is DENIED in part and GRANTED in part as set forth above.

DONE this the 17th day of October, 2005.

/s/ Mark E. Fuller

CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS JOHNSON, Plaintiff,

V.

CITY OF CLANTON, ET AL., Defendants.

Case No. 2:04-CV-117-B

DEMAND FOR JURY TRIAL

AMENDED COMPLAINT

JURISDICTION

1. This Honorable Court has jurisdiction of this cause of action pursuant 42 U.S.C. § 1983 and § 1988, 28 U.S.C. § 1331 and § 1343(a)(3) and (4), and the Fourth and Fourteenth Amendment to the United States Constitution. Plaintiff requests that this Honorable Court accept pendent jurisdiction of any and all claims arising out of state law.

PARTIES

2. Thomas Johnson is over the age of 19 years and is a resident of Chilton County, Alabama, residing at 2494 County Road 34, Clanton, Alabama, United States of America. He will hereinafter be referred to as "Plaintiff."

3. The City of Clanton is an incorporated municipality located within the State of Alabama, and for venue purposes is also located in the Middle District of Alabama..

4. Defendant Dewayne Wright is an officer with the Police Department of the City of Clanton, the afore-referenced incorporated municipality located within the State of Alabama. Officer Dewayne Wright is named as a Defendant in his individual capacity.

5. Samuel Olgilvie is an Explorer with the Police Department of the City of Clanton, the afore-referenced incorporated municipality located within the State of Alabama. Explorer Olgilvie is named as a Defendant in his

individual capacity.

6. Chilton County Commission is a governmental entity located in the State of Alabama, and for venue purposes is also located in the Middle District of Alabama.

7. County Deputy Stephen Brock is an officer of the Chilton County Sheriff's Department and is named as a Defendant in his individual capacity.

8. County Deputy Robert Bland is upon information and belief an officer of the Chilton County Sheriff's Department and is named as a Defendant in his individual capacity.

9. County Deputy Nick Baker is upon information and belief an officer of the Chilton County Sheriff's Department and is named as a Defendant in his individual capacity.

10. County Deputy Kevin Driver is upon information and belief an officer of the Chilton County Sheriff's Department and is named as a Defendant in his individual capacity.

11. Jemison Police Officers Mark Bass and Joe Monroe were upon information and belief police officers for the City

of Jemison, an incorporated municipality located within the State of Alabama, and they are named as Defendants in their individual capacities.

12. Officer Dewayne Wright; Explorer Samuel Ogilvie; Chilton County Deputies Stephen Brock, Robert Bland, and Nick Baker; and Officers Mark Bass and Joe Monroe will hereinafter be collectively referred to as "Defendant Officers".

13. This is a proceeding for a judgment declaring the rights, responsibilities and liabilities of the parties and for compensatory and punitive damages for Plaintiff's suffering as a consequence of the wrongs alleged herein.

FACTS

14. At all times relevant Officer Dewayne Wright and Explorer Samuel Olgilvie were duly appointed and acting as Police Officer for the City of Clanton. As such, Officers Wright and Olgilvie were duly appointed agents authorized to enforce the laws of Alabama and was so acting under color of

the law of Alabama.

15. At all times mentioned herein, Officer Wright and Explorer OLGILVIE were agents and/or employees of the City of Clanton, Alabama and each was acting within the course and scope of said agency and/or employment.

16. At all relevant times County Deputies Brock, Bland, Baker, and Driver were duly appointed and acting as a Sheriff's Deputies for the Chilton County Sheriff's Department under the direction of the Chilton County Commission. As such, Deputies Brock, Bland, Baker, and Driver was duly appointed to enforce the laws of Alabama and was so acting under color of law of the State of Alabama.

17. At all times mentioned herein, County Deputies Brock, Bland, Baker, and Driver were agents and/or employees of the Sheriff's Department of Chilton County under the direction of the Chilton County Commission and were acting within the course and scope of said agency and/or employment.

18. On May 25, 2002 at approximately 11:00 p.m. Plaintiff and his wife went to the Skylight Bar in Clanton, Alabama where they stayed for approximately fifteen minutes without having any alcoholic beverages.

19. Upon leaving the establishment and reaching their automobile, Plaintiff first opened the driver's side door for his wife and then proceeded to walk around the front of the car towards the passenger door.

20. Before he made it to the passenger door, Officer Dewayne Wright pulled up behind their vehicle, rolled down his window and yelled at Plaintiff asking what he was doing.

21. Plaintiff responded that they were not doing anything and were getting ready to go home. Officer Wright then got out of his vehicle and asked if Plaintiff was urinating. Plaintiff explained that he was not and that the water on the ground was coming from the air conditioner. During this time Plaintiff's wife was asking the Officer what was going on to which he responded for her to shut up.

22. About this time Explorer Samuel Olgilvie got out of the police car. Officer Wright was still yelling at Plaintiff stating that he could arrest him. Plaintiff's wife continued to apologize to the officer and asking if they could leave. Officer Wright further kept insisting that Plaintiff say "Thank you Officer Sir," and "yes sir, Mr. Police Officer."

23. Officer Wright further told Plaintiff's wife that if she did not shut up he would arrest her. Plaintiff responded to Officer Wright that he could not arrest his wife because they had not done anything. Plaintiff then proceeded to get into his car.

24. Officer Wright then yelled, "You're under arrest." When Plaintiff turned around and responded, "for what," Officer Wright sprayed mace in his face.

25. Plaintiff then grabbed his eyes in pain and clumped forward at which time Officer Wright struck him with his nightstick behind his knees causing him to fall. While on the ground and after he had been handcuffed, Officer Wright and

Explorer Olgilvie began to strike him several times with their nightsticks. Officer Wright and Explorer Olgilvie slammed Plaintiff's head into paved parking lot causing him to bleed.

26. The Officers subsequently arrested Plaintiff and transported him to the jail. Upon arrival at the jail the clerk asked what the charges would be. The Officers responded that they did not know the charge.

27. Once in jail, County Deputies Stephen Brock, Robert Bland, Nick Baker and Kevin Driver, along with Jemison Police Officers Joe Monroe and Mark Bass continued to punch hit, knee, choke and use excessive force on the Plaintiff. Plaintiff yelled and screamed, but did not attempt to defend himself at any time or in any way.

28. Plaintiff was then moved to another room and restrained in a chair. A harness was placed over his shoulder and straps were placed across his chest, waist, and legs while his hands remained in handcuffs. In this room the Defendant Officers continued brutally beating the Plaintiff.

29. At some point Defendant Officers ceased beating the Plaintiff and he was transported to the hospital.

30. Based on the totality of the circumstances at the time of the incident, Defendants unlawfully arrested Plaintiff and used excessive force on the Plaintiff.

31. Defendant Officer Wright and Defendant Explorer OLGILVIE were indicted on August 29, 2003, for Felony Assault by the Chilton County Grand Jury as a result of the incident described herein.

32. As a direct and proximate consequence of the Defendants actions Plaintiff was injured as follows:

a. Suffered injuries to his body;

b. Medical bills and other financial losses;

c. Embarrassment and humiliation;

d. Pain and suffering; and

e. Mental anguish and emotional destress.

COUNT ONE

42 U.S.C. §1983

FOURTH AMENDMENT EXCESSIVE FORCE CLAIM AGAINST DEFENDANT OFFICERS

33. Plaintiff adopts and incorporates by reference the allegations in the aforementioned paragraphs as if fully set forth herein.

34. Plaintiffs had a protectible interest in their freedom. They further had a right under the Fourth Amendment to the United States Constitution to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The aforementioned rights were clearly established at the time of the conduct giving rise to the claims herein. Defendant Officers, acting in their official capacity and under color of state law and with intent wrongfully injured Plaintiff and in doing so violated the Fourth Amendment to the Constitution of the United States.

35. The actions of the Defendant Officers, in using excessive force, were objectively and subjectively unreasonable and constituted a violation of the clearly

established laws on the use of excessive force. Furthermore, Defendant Officers lacked a reasonable basis for assuming that Plaintiff had committed a crime warranting the use of force. Plaintiff's rights under the Fourth, Fifth, and Fourteenth Amendments were thus impermissibly abridged and violated. The City of Clanton and the Chilton County Commission failed to adequately train and supervise the Defendant Officers in proper investigative and detainment procedures, which failure amounts to deliberate indifference to the rights of persons with whom the City of Clanton's and the Chilton County Commission's officers come into contact, and which failure constitutes a custom and policy of the City of Clanton and the Chilton County Commission.

36. As a direct and proximate consequence of Defendant Officers actions, Plaintiff was injured as stated above.

COUNT TWO

FOURTH AMENDMENT VIOLATION FOR UNREASONABLE SEIZURE AGAINST DEFENDANT OFFICERS

37. The Plaintiff re-alleges and incorporates the allegations in the aforementioned paragraphs as if fully set forth herein.

38. The foregoing facts as alleged violated the Plaintiff's right under the Fourth Amendment to be secure in his person from unreasonable seizures. The City of Clanton and the Chilton County Commission failed to adequately train and supervise the Defendant Officers in proper investigative and detainment procedures, which failure amounts to deliberate indifference to the rights of persons with whom the City of Clanton's and the Chilton County Commission's officers come into contact, and which failure constitutes a custom and policy of the City of Clanton and the Chilton County Commission.

39. As a direct and proximate consequence of such violation, Plaintiff was injured as stated.

COUNT THREE

FOURTH AMENDMENT VIOLATION FOR UNLAWFUL ARREST AGAINST DEFENDANT OFFICERS

40. Plaintiff re-alleges and incorporates the allegations in the aforementioned paragraphs as if fully set forth herein.

41. Defendant Officers, without a warrant and without probable cause arrested Plaintiff in violation of his Fourth Amendment right to be secure in his person from unreasonable seizure and their Fourteenth Amendment right to be deprived of their liberty without due process of law.

42. At all times mentioned herein Defendant Officers were acting under color of law.

43. The actions of Defendant Officers were reckless, grossly negligent, motivated by evil motive or intent and involved reckless and callous indifference to the federally protected rights of others. The City of Clanton and the Chilton County Commission failed to adequately train and supervise the Defendant Officers in proper investigative and detainment procedures, which failure amounts to deliberate

indifference to the rights of persons with whom the City of Clanton's and the Chilton County Commission's officers come into contact, and which failure constitutes a custom and policy of the City of Clanton and the Chilton County Commission.

44. As a direct and proximate consequence of such violation, Plaintiff was injured as stated above.

COUNT FOUR

ASSAULT

45. Plaintiff re-alleges and incorporates the allegations in the aforementioned paragraphs as if fully set forth herein.

46. The Defendant Officers acted in concert with each other to assault the Plaintiff.

47. The Defendant Officers committed the tort of assault upon the Plaintiff through their intentional attempts to do harm to the Plaintiff.

48. As a direct and proximate consequence of said assault Plaintiff was injured as described above.

COUNT FIVE

BATTERY

49. Plaintiff re-alleges and incorporates the allegations in the aforementioned paragraphs as if fully set forth herein.

50. The Defendant Officers acted in concert with each other to batter the Plaintiff.

51. The Defendant Officers made intentional, unlawful, and harmful physical contact with Plaintiff when they were arresting him and once they got him to the Chilton County Jail.

52. The Defendant Officers intended the actions that led to the physical contact with the Plaintiff.

53. As a direct and proximate consequence of said battery Plaintiff was injured as described above.

COUNT SIX

NEGLIGENCE

54. Plaintiff re-alleges and incorporates the allegations in the aforementioned paragraphs as if fully set forth herein.

55. The aforementioned conduct by the Defendant Officers constituted negligent behavior in that the Defendant Officers had and owed a duty to Plaintiffs to conduct themselves in such a way as to avoid harming Plaintiffs.

56. In engaging in the conduct they did, as more fully set forth and described herein, the Defendant Officers were neglectful, careless, and unskillful as compared to reasonable police officers.

57. The Defendant Officers negligently harmed Plaintiff.

58. As a direct and proximate consequence, Plaintiff was injured as described above.

COUNT SEVEN

FALSE ARREST/FALSE IMPRISONMENT

59. Plaintiff re-alleges and incorporates the allegations in the aforementioned paragraphs as if fully set forth herein.

60. Defendant Officers detained Plaintiff, prohibited him from leaving, circumscribed his physical liberty, ordered him and compelled him to go from place to place without a

warrant and with neither reasonable suspicion nor probable cause to do so.

61. Plaintiff was placed under arrest and imprisoned without warrant and without probable cause.

62. Plaintiff was falsely arrested and falsely imprisoned by Defendant Officers.

63. Plaintiff has been damaged thereby.

PRAYER FOR RELIEF

WHEREFORE, THE PREMISES CONSIDERED, Plaintiff prays for relief as follows:

a) Enter a declaratory judgment that the policies and practices complained of herein are unlawful and volative of the fourth, Fifth, and Fourteenth Amendments to the United States Constitution, as addressed by and through 42U.S.C.A. § 1983;

b) Grant Compensatory damages in favor of Plaintiff as against all defendants of $1,000,000.00;

c) Grant Punitive damages to Plaintiff as against

Defendant Officers in the amount of $5,000,000;

d) Grant Plaintiff the cost of this action including reasonable attorneys' fees;

e) Grant such other, further and different relief as this Court may deem just and proper, including all equitable relief, the awarding of which is within the jurisdiction of the Court.

Respectfully Submitted,

/s/ Jock Smith
JOCK M. SMITH
BRIAN P. STRENGTH
Attorneys for Plaintiff

OF COUNSEL:
COCHRAN, CHERRY, GIVENS & SMITH, P.C.
306 North Main Street
P.O. Box 830419
Tuskegee, Alabama 36083
(334) 727-0060
(334) 727-7197 -fax

PLAINTIFF DEMANDS TRIAL BY STRUCK JURY ON ALL ISSUES SO TRIABLE

/s/ Jock Smith
OF COUNSEL

APPENDIX E
AFFIDAVIT OF CHIEF OF POLICE
JAMES HENDERSON

JUNE 8, 2005

Comes now the undersigned and, after being duly sworn, makes the following affidavit:

My name is James Henderson. I am over the age of 19 years and I make this affidavit based upon my own personal knowledge, information and belief.

I have been the City of Clanton Chief of Police for the past 14 years, and a total of 20 years.

Sam Ogilvie was a participant in the City of Clanton's Explorer Program. This volunteer program is an extension of fellow scouting programs offered by the Boy Scouts of America. The City's Explorer Program is basically just a civilian ride-along program. The City of Clanton's Shift Sergeant provides supervision and oversight to the Explorer participant. The Clanton Police Department also provides training to the participant on proper conduct during the ride-

along.

The City has adopted and utilizes a number of practices and polices designed not only to prevent the type of conduct that the Plaintiff has alleged, but also to prevent Explorer participants from being mistaken as police officers. Aside from our supervisory and training practices, the Clanton Police Department makes sure that Explorer participants are clearly identifiable from Clanton police officers. For example, Explorer participants are issued a uniform containing a cloth badge that reads "Explorer". See **Exhibit A**. Furthermore, Explorer Participants are not allowed to carry the same weapons as police officers, including a baton. See **Exhibit B**. Participants in this program receive absolutely no money or anything of value. Explorer participants are not given any benefits whatsoever.

Further Affiant saith not.

/s/ James Henderson

James Henderson

STATE OF ALABAMA
COUNTY OF CHILTON

Before me, the undersigned Notary Public in and for the State of Alabama at Large, personally appeared James Henderson, and after being first duly sworn, did depose and say that the statements in the foregoing Affidavit are true and correct.

Given under my hand and official seal this the 8th day of June, 2005.

/s/ Johnny K. Maddox
Notary Public
My commission expires: 02/13/06

APPENDIX F
EXCERPTS FROM THE DEPOSITION OF SAMUEL OGILVIE

APRIL 21, 2005

PAGE 15
LINE

5 **Q.** Do you hold any certifications?

6 **A.** Yes, I do.

7 **Q.** Tell me about those.

8 **A.** I hold – I hold a Firefighter 1; a

9 Volunteer Firefighter 1; also, a Fire

10 Instructor 1.

11 **Q.** Any other certifications?

12 **A.** No.

13 **Q.** Did you at some point have occasion to

14 have some involvement with the Clanton

15 Police Department? It's my

16 understanding you have some affiliation

17 with them in the Explorer Program; is

18 that right?

19 **A.** Correct.

20. **Q.** Can you tell me about the Explorer

21. Program?

22 **A.** It's a sublet type of thing off of the

23 Boy Scouts.

PAGE 16
LINE

1 **Q.** All right. Were you a Boy Scout?

2 **A.** No, I was not.

3 **Q.** How did you become involved in the

4 Explorer Program?

5 **A.** They sent out a letter to me and said

6 they're having this Explorer meeting,

7 and it briefly explained what they

8 did. And I showed up and signed up.

PAGE 18
LINE

Q. Okay. Had you had any training or exposure to law enforcement prior to that meeting?

A. No.

PAGE 22
LINE

Q. Do you ever remember receiving a copy of any handbooks or – signing any handbooks from the Clanton Police Department?

A. Handbooks, no.

Q. Other than your uniform, were you issued anything else by the Clanton Police Department?

MR. PORTER: Object to the form.

Q. And by that, I mean in the way of equipment, like a badge or a night

20 stick or a –

21 A. No.

22 Q. I wouldn't think a gun.

23 A. No.

PAGE 31
LINE

8 Q. And on these ride-alongs, what were

9 your responsibilities generally?

10 A. I had very few responsibilities.

11 Q. What were some of them, the few that

12 you had?

13 A. Well, now that I think about it, I

14 don't guess I really had any

15 obligations when I was in there.

PAGE 50
LINE

20 Q. Well, not "a aggressive move."

21 Describe the aggressive move that you

22 personally saw Mr. Johnson do.

23 **A.** It was kind of like a – like a – you

PAGE 51
LINE

1 know, like he was – stepped towards

2 him really fast.

3 **Q.** Did he draw his fist back?

4 **A.** No, he didn't draw his fist – I

5 didn't see – I mean, I don't – I'm

6 not – I didn't see his fist draw

7 back.

8 **Q.** Did he try to touch Officer Wright?

9 **A.** It looked like he was – it looked

10 like to me from where I was standing

11 that he was – that he was

12 attacking – he was about to attach

13 him.

14 **Q.** And I guess my question is, what

15 specifically about what he did made

16 you believe he was about to attach

17 him?

18 A. Well, the leading up to the events,

19 him being so, you know, just – had

20 the mindset of, you know, I – you

21 know, why are you doing this; just his

22 body gestures; everything that I saw

23 about him just screamed anger.

PAGE 52
LINE

1 Specifically the aggressive stance,

2 the aggressive move, kind of – just

3 looked like he was bracing after him.

4 Q. Did he take a step towards him?

5 A. Yes, he did.

PAGE 53
LINE

1 And he maces him, and he says, get on

the ground, get on the ground. And he doesn't. And it seemed like he's – the mace doesn't affect him, and so he takes another step towards Wright. Well, Wright maces him again. And he says, get on the ground, get on the ground. And, you know, it – it seemed like he was – he was up like this (indicating) now. Like, you know, and finally, Wright pulls out his baton and says, get down, and hits him on the leg with it, left thigh. He falls to the ground.

Q. Meaning Thomas?

A. Huh?

Q. Johnson falls to the ground?

A. Johnson falls to the ground. Wright

grabs his – his I guess that would
have been his left arm and is trying
to gain control of it. They're on the
ground now. Seeing how big the guy is
and Wright's struggling with him, I

PAGE 54
LINE

jumped down to the back of Mr. Johnson
and try to get his arms out from
behind his back – get his arm – his
right arm from behind his back.
And, eventually, I ended
up digging it out, and Wright had a
handcuff on his left arm. My – my
arm got back there, so he handcuffed
it – handcuffed Johnson, I'm sorry,
not mine – and we stood him up, and
we start going to the patrol car.

APPENDIX G
EXCERPTS FROM THE DEPOSITION OF JENNIFER GLENN

JUNE 16, 2005

PAGE 54
LINE

19 Q. So you never saw anything in Sam's hands,
20 and you never saw him actually land a blow
21 or a lick on Mr. Johnson, did you?
22 A. No.

PAGE 55
LINE

4 Q. And Mildred – do you recall Mildred at one
5 time saying that she was aware that this
6 boy, this teenager, was not a policeman?
7 Wasn't any question that he was not a
8 policeman?
9 A. Yeah. I think we were all wondering who he
10 was, you know, of course, he wasn't in a
11 uniform.

APPENDIX H
EXCERPTS FROM THE DEPOSITION OF MILDRED JOHNSON

DECEMBER 21, 2004

PAGE 22
LINE

19 **Q.** The man in Montgomery.

20 Okay. What about Mr. Ogilvie? Did

21 you know anything about him at all when this

22 occurred?

23 **A.** The only thing I know about

PAGE 23
LINE

1 him is just he was a young Explorer, an

2 Explorer.

3 **Q.** That is a volunteer type

4 position to ride with the police officers or

5 something of that sort?

6 **A.** These are young men that

7 wanted to be a policeman, thinking about

8 being a policeman.